of 'natural justice' in the context of the informal, summary procedure whereby judges who are confronted with an apparent instance of contempt within or near their court rooms may try the contempt on the basis of what they perceive with their unaided sense, or of matters reported to them by court officials. The advantages of this summary procedure are that it is swift and efficient, but these advantages are outweighed if the trial which takes place is not conducted in a manner which is wholly fair to the accused. Indeed, the advantages are wholly dissipated if through erring on the side of informality or demonstrating bias the presiding judge provides the basis for a successful appeal on the ground that natural justice has been denied.

who needs family law anyway

Our Ford . . . has been the first to reveal the appalling dangers of family life.

Aldous Huxley, *Brave New World*

yet more constitutional problems. Ever since the Family Law Act came into operation 10 years ago, there has been continuing conflict between the State Supreme Courts and the Family Court over the jurisdiction of each to deal with disputes arising from the breakdown of marriages. Moves to sort out the confusion received a severe set back in December last year with the handing down of two decisions by the High Court and with the defeat of the referendum on the interchange of powers.

In the first case, *Cormick v Cormick,* the High Court considered the question of what children fall within Commonwealth power. The definition of 'child of a marriage' has had a chequered history. As originally enacted the definition was wide enough to cover all children who were being cared for by a married couple and formed part of their family. However, the High Court in *Russell v Russell* said that this definition was too wide, and the Parliament amended it to cover only children born to or adopted by both spouses. As soon became all too evident, this left awkward gaps in the Family Court's jurisdiction. Children from spouses' previous marriages and any adopted or ex-nuptial children of either of them fell into the jurisdiction of State Supreme Courts. This often meant that parallel proceedings had to be instituted in two courts in relation to children from the same family unit.

This situation was plainly unsatisfactory. Many argued that Parliament had overreacted to the *Russell Case,* narrowing the definition of 'child of a marriage' further than was warranted by the majority's reasoning, and that in any event the court might be willing to reconsider the whole question afresh. Parliament decided to chance its arm and amended the definition of 'child of a marriage' to restore to the Family Court much of the original jurisdiction. As a cautionary measure, the definition was broken into six separate categories, permitting the High Court to strike out those it considered invalid without bringing the rest down.

The *Cormick* case fell into the last, and widest, category, covering children not born to or adopted by either spouse but who lived with them as part of their family. Mrs Cormick had brought proceedings in the Family Court seeking the custody of her illegitimate grandson, now aged six, who had lived with her and her husband since he was 22 months old. The grandmother said that the little boy had been reared by her as if he was her own child. Her daughter, the biological mother, opposed the making of the custody order and argued that the Family Court had no constitutional power to hear the grandmother's application. She said it had to be heard in the State Supreme Court. The case was removed to the High Court and the Commonwealth intervened on the grandmother's side and the States of Queensland and Tasmania intervened on the daughter's.

The Commonwealth argued that the connection with the marriage power lay not in how the children came to form part of the married couple's family but rather in the fact that the couple had assumed parental responsibility for their care and nurture. In other words the married couple do not have to be the biological parents, it is enough that they stand in *'loco parentis'* to the

children, that they have taken on the role of primary care-giver.

This argument was rejected by six of the seven justices (Gibbs CJ, Mason, Wilson, Brennan, Deane, and Dawson JJ; Murphy J dissenting). In the majority judgment, Justice Gibbs said that Parliament could not simply deem any children to be children of a marriage. His Honour said there had to be a connection between the child and the marriage and that this arose where it was born to or adopted by either spouse.The mere fact that the boy was cared for by Mr and Mrs Cormick did not convert it into a child of their marriage.

In a vigorous dissenting judgment, Justice Murphy said that the High Court had to recognize the realities of modern Australian family life and that the power of the Federal Parliament must extend to cover all those children who form part of the family unit built around a marriage. He saw no logical reason to draw a line through a family unit based on notions of blood relationship, with children on either side of that line falling into different courts.

Not all of the new categories of 'child of a marriage' may have been swept away by this decision. Gibbs C.J. says the Family Court's jurisdiction covers children born to or adopted by *either* spouse, which would bring in step children. This would be a significant advance on the previous situation. However, there appears to be a flaw here in his Honour's reasoning. If the constitutional connection between a child and a marriage is to be a blood or imputed blood relationship then it is difficult to see how a child who is only related in this way to one spouse and not the other is a child of their marriage. On the majority reasoning, it is surely a child of the relationship between its biological parents. The only relationship that the step parent has with that child is one of nuture, of *loco parentis,* which takes one full circle to the Commonwealth's argument for the validity of the new definition.

The second case, *Re Ross-Jones; ex-parte Green,* followed close on the heels of the first. Mrs Green had obtained a judgment debt in the Victorian Supreme Court against her former son-in-law, Dr Marinovich, after he failed to meet his repayments on a loan she had made to him. At the same time, Dr Marinovich had instituted proceedings in the Family Court between himself and his former wife seeking a division of their property, and for an order that she indemnify him against any money he was forced to pay out to her mother. In the interim, the husband requested that the Family Court restrain Mrs Green taking any further action to enforce the judgment debt until these proceedings were resolved. After a preliminary hearing, Justice Ross-Jones made a temporary injunction and adjourned the matter for a fuller hearing. Rather than wait for this hearing or appealing to the Full Court, Mrs Green went straight to the High Court for a writ of prohibition on the basis that the Family Court had no jurisdiction at all to make any order against her. The Commonwealth intervened, arguing the High Court proceedings were premature because the Family Court had not yet decided this jurisdictional issue but had merely frozen the situation until it could do so.

Six out of the seven justices (Gibbs CJ, Mason, Murphy, Wilson, Brennan and Dawson JJ; Deane J dissenting) rejected this argument and held that the High Court could intervene where there has been a clear error by the lower court and the rights of the applicant had been detrimentally affected. The Chief Justice gave two reasons for the Family Court's want of power. Under the terms of its own Act, the Family Court has no jurisdiction unless the proceedings fall into one of the definitions of 'matrimonial cause'. In this case, this meant that Mrs Green's proceedings in the Supreme and Federal Courts had to be 'in relation to' the pending property proceedings between the spouses in the Family Court. While the Chief Justice conceded that the recovery of the debt by Mrs Green would have the practical effect of reducing the property pool available for division between the spouses, it could not be said the two sets of legal proceedings were related within the meaning of the Act. The second, and wider, ground given by the Chief Justice was

that the Commonwealth could not under its constitutional powers over marriage and matrimonial causes give the Family Court a jurisdiction to make orders against third parties which affect their rights. His Honour appeared to overrule decisions of the Family Court which said that it could at least temporarily suspend a third party's rights, especially where he or she has been closely involved with the marriage. The other majority justices took a similar line, although Justice Murphy appears to have left the Family Court decisions standing.

Justice Deane in his dissenting judgment said that the Family Court should first have the opportunity to decide its own jurisdictional limits and that there were good practical reasons for this. His Honour pointed out that the Justices of the High Court have little practical experience of family law and that the High Court would have benefited from the Family Court's views on the practical significance of these sorts of injunctions in its jurisdiction. For this reason, His Honour thought it inappropriate to make any decision about the Family Court's jurisdiction to make orders against third parties. However, he did indicate that the majority may be reading more into the Family Court decisions on this point than is warranted.

The High Court's decision in this case may create even more difficulties for family law than *Cormick*. It is common place for the parents of spouses to lend or give money to them during their marriage. Sometimes these are full commercial transactions just as if they were between strangers dealing at arm's length. Often times, however, it is intended by all concerned that the money will never be repaid. However, where the marriage breaks down the parents will often call for the repayment of the money. It is often suspected that their intention is to pass the money back to their son or daughter after the completion of the Family Court proceedings, distorting the division of the matrimonial property between the spouses. The *Re Ross-Jones; ex-parte Green* decision will mean that parents and other third parties will be able to bring these debt recovery proceedings immune from the Family Court's control. Spouses will often be fighting on two fronts, in the Family Court between themselves and in the Supreme or Federal Courts with their in-laws. The decision will also mean that the Family Court has even less power over family companies and trusts, which while controlled by or on behalf of one spouse are treated in law as separate entities. The High Court left a narrow exception where it can be shown that the company or trust is a complete sham or puppet of a spouse.

These may only be a few of the more obvious consequences of the *Re Ross-Jones; ex-parte Green* decision. Spouses deal with third parties on almost a daily basis during their marriage, raising mortgages or other debts, buying and selling property etc. The Law Reform Commission in its matrimonial property reference is looking at this whole area, both its policy and constitutional implications. This decision of the High Court will greatly add to the complexity of this task.

If these decisions seem divorced from realities of family life, how did they happen? Crispin Hull, writing in the Canberra Times put forward an interesting explanation drawing on an analogy with the medical profession. In the medical world, the progression is from the generalist to increasingly more specialized doctors. So, if a person has a swollen knee he or she will first visit a general practitioner, who may advise a visit to an orthopaedic surgeon, who may in turn consult another surgeon who specialises in knees alone. The law, Mr Hull said, turns this pattern on its head. For example, on the breakdown of a marriage, disputes between parties will first come before a specialist Family Court judge who has been chosen for his or her experience in the field of family law and human relationships. The case may then be appealed to three Family Court judges sitting as the Full Court. However, from there it leaves the specialists and goes up to the seven justices of the High Court who have little or no knowledge of family law. The explanation for this process derives from the special nature of legal scholarship. Lawyers are not so much taught details of law but rather a process of legal thinking and reasoning which they can

apply to any facts or in any area of law. Justices of the High Court are specialists in legal reasoning and thus are permitted to hear appeals from areas in which they have no particular knowledge. However, if anything has been clearly established over the last ten years of the Family Court's operation, it is that the ordinary principles or processes of the law have little relevance to the complex and emotional situations which arise on the breakdown of a marriage. The Commission's work in its matrimonial property and contempt references have strongly confirmed this. Decisions such as *Cormick* and *Re Ross-Jones; ex parte Green* will continue to happen until the Justices of the High Court turn their minds to the special character of family law.

the noes have it. Many of the jurisdictional problems would disappear at a stroke if all the fragmented parts of family law could be brought within the legislative competence of only one parliament. This could have been achieved under the proposed 'interchange of powers' amendment to the Constitution. Its defeat at the December elections was a severe blow to family law.

It is already possible under the Constitution for the States to transfer powers to the Commonwealth should they so elect and there has been discussion for some time on a reference of certain family law powers. However, the interchange of powers proposal had two advantages. Firstly, it is not clear under the present provision whether a State could at some future date take back powers it had referred to the Commonwealth. Under the interchange of powers provision, the grant of power to the Commonwealth would at all times have been revocable. Secondly, under the present provision the Commonwealth cannot give any of its powers to the States. There are clearly areas of State power which are deficient and which would benefit from additions of Federal power; for example, the States' power to collect taxes on the sale of goods. States have understandably been reluctant to further strengthen the position of the Commonwealth in the Federation by giving up some of their own powers. The proposed amendment would have allowed them to get powers in return from the Commonwealth Government, thereby roughly maintaining the balance of power in the Federation.

The interchange of powers proposal has over the last ten years received unanimous support at successive constitutional conventions, which are composed of representatives from all political parties and from State and Federal parliaments. However, just prior to the December election, the opposition parties changed their minds and called for a 'No' vote for this and the other referendum on simultaneous elections of the Senate and the House of Representatives. There was a great deal of rhetoric about the interchange of powers reference being a grab for power on the Commonwealth's part. The Commonwealth could not of course do anything under the proposed amendment without the consent of the States. However, it was said, perhaps with some justification, that the Commonwealth's domination of the taxing powers would permit it to bribe or cajole the States into giving up their powers. It was also said that this proposal would permit politicians – both Federal and State – to effect great changes in the Constitution without ever having to put these to the people in referendums. In the event, the referendum was soundly defeated, only winning a majority in Victoria.

Following the defeat of the referendum, the original proposal for a reference of family law powers under the existing provisions of the Constitution has been cranked up again. While not all States have agreed to take part in the reference, the Commonwealth is anxious to press ahead with those that are.

the plight of family law. The former Chairman of the Law Reform Commission, and now President of the NSW Court of Appeal hit the headlines again with a speech on family law. (In September, Justice Kirby criticised the lack of support offered to the Family Court by the profession: see *Reform,* October 1984 No 36.) The occasion was the annual dinner of the Family Law Section of the Victorian Law Insti-

tute and the topic, 'The Low Status of Family Law'.

Justice Kirby rebutted suggestions that family law was somehow a soft or intellectually unchallenging branch of legal practice. Family law, he said, is not a self-contained category which can be hived off from other areas of the law or practised separately. The breakdown of a marriage is a cross-over point at which a number of different branches of legal knowledge come together. This flows inevitably from the fact that marriage is still the basic economic and social unit within Australian society. Justice Kirby said during the course of a marriage a couple may purchase a home, secure a mortgage over it and incur other debts and liabilities towards third parties. They may set up a trust or corporate structure to reduce the incidence of personal taxation or run a business together. All of these arrangements are built around the marriage. So long as it continues, Justice Kirby said the existence of a marriage can largely ignored for the purposes of the law and married and non-married people can be treated without distinction in the different Federal and State jurisdictions. When, however, their marriage comes to an end, these arrangements and dealings need to be unravelled. The family law practitioner who is consulted at the end of the marriage is therefore concerned not only with how the rights are to be adjusted as between the spouses but with the re-arrangement and readjustment of a series of interconnected relationships.

Justice Kirby pointed to a failure on the part of legislators – Federal and State – and legal policy makers to understand this inter-relationship of family law with other areas of the law. As a consequence there were serious gaps, overlaps and inconsistencies in almost every sector of the Family Court's jurisdiction. By way of example, His Honour referred to the overlaps between family law and the laws of succession, trusts and companies and insolvency. The Law Reform Commission will be looking at some of these problems in its matrimonial property and bankruptcy references.

Justice Kirby also criticised the condescending attitude to family law practitioners held by many of his fellow judges and practitioners in other jurisdictions. He said that there was a widely held view within the legal profession that family law is somehow less worthy than tax, commercial or admirality law. Lawyers tended to measure status according to the money making potential or the high commercial stakes involved in a particular area. Family law, with its high emotional content and its focus on the ordinary lives of people, was for these reasons low down in many lawyers' estimation. Justice Kirby said there was a danger that this could be a self-perpetuating cycle. While there were many competent and dedicated family law practitioners, the general attitude of the legal profession meant that there were a large number of young and inexperienced practitioners who cut their teeth in the area, only to move on to more lucrative and prestigious work when the opportunity presented itself. Justice Kirby urged the Law Institute and other professional bodies to put greater energies into raising the standard of practice in the Family Court. Law schools should be encouraged to expand their courses on family law in order to reflect the wider legal and social horizons of practice in this area. With one in every 2.6 marriages breaking down, His Honour said that it was essential that family law become a compulsory subject for law students. This would in turn contribute to the enhancement of the profession's respect for family law as an essential element in the 'lawyer's armoury' in modern Australia.

was genghis khan a family lawyer? After the bombings of the homes of Family Court judges and Court buildings, a great deal of soul-searching has gone on both inside and outside the Family Court. The Chief Judge, Justice Evatt, has expressed concern that a serious lack of resources in the Court inhibits its effectiveness in dealing with the more difficult cases. However, the Court also feels it has received much of the blame for the deficiencies of the legal profession. The Principal Registrar, Mr Brian Knox, in a speech delivered in December to the first national conference of family law-

yers n Hobart criticised the attitude and approach of many practitioners to family law. Mr Knox said that many practitioners adopt used car bargaining techniques, have a neanderthal level of knowledge and an attitude to the divisionof property and families similar to that exhibited by Genghis Khan surveying the Mongol hordes. He referred to a survey of a hundred complaints received by the Court which found that the main criticisms levelled by the complairants related to their lawyers. People said that they were given bad or incorrect advice, that their lawyers overcharged or failed at the outset to give some idea of what the case might cost, or did not keep them fully informed of progress. Mr Knox called for greater efforts to be put into continuing education by law societies and voiced his support for a Family Law Council proposal that lawyers be accredited and advertise themselves as family law specialists.

The Law Council of Australia reacted strongly to the Principal Registrar's comments, rejecting them out of hand. The Law Council referred to early results from the Economic Consequences of Divorce study conducted by the Commission and the Institute of Family Studies which it said showed nearly two-thirds of the people interviewed were satisfied with their lawyers. The Council said that these figures pointed up the dangers of relying on the complaints of a vocal minority, or ancedotal perceptions, rather than on soundly based objective research.

Mr Knox remained unrepetent, although he thought that his comments had been taken out of context. He said that he had acknowledged there were many competent and dedicated practitioners in the jurisdiction and that his comments were directed towards 'the bad apples'. In his view, the complaints to the Court and the figures from the Economic Consequences study were not necessarily inconsistent, both showing that there were problems with the quality of legal practice in the jurisdiction. He took the view that a one-third dissatisfaction rate was a matter of serious concern.

The IFS and Professor Hambly cautioned against reading too much into the early data coming out of the Economic Consequences Study. Further analysis of the reasons given by the sample population would have to be done before a fuller picture of attitudes towards the Court, lawyers and the law could emerge.

consumer feedback. In the same speech Mr Knox announced the establishment of a Client Services Committee to receive and investigate complaints. The Committee consists of the Chief Judge, the Principal Registrar, the head of the Court's counselling service, the Court's research psychologist, a deputy registrar, and the Information Officer. The Family Law Council and the Attorney-General's Department would also be invited to nominate a member each. Complaint letters presently sent to the Court, to the Attorney-General or to the Family Law Council would be directed to this Committee where they concerned the operation of the Court system or the conduct of a case. During the investigation, no individuals – in the Court, the profession or litigants – would be identified.

Mr Knox said that the Committee was an important step towards recognising the legitimacy of consumer complaints and would result in action to alter or remedy any behaviour which is the cause of distress or dissatisfaction to the Court's clients. He stressed that the Committee would not provide a forum for clients to relitigate their dispute, that being a matter for the appeal bench. This experiment in 'consumer protection' is unique in a legal system and its progress will be watched with interest by all those concerned with law reform.

a new direction in family law? One of the brighter spots in family law over the last year has been the emergence of the concept of Family Law Centres. On the recommendation of the Family Law Council, the Federal government has invested over $600,000 in two pilot Family Law Centres, one at Wollongong in NSW and the other at Dandenong in Victoria.

The idea is to provide advice and assistance in family law matters through shopfront, community based centres. The services provided will include:

- provision of information including about options available to parties on the breakdown of their marriage and their rights and responsibilities towards each other and their children;
- on the spot counselling and concilliation of disputes;
- legal advice, but not legal representation other than in necessitous circumstances;
- financial advice and assistance with social security and housing, and generally assisting parties to re-establish themselves;
- where appropriate, referral to other agencies, including the Family Court and marriage guidance groups.

It is well accepted that every reasonable opportunity and facility should be made available to parties on the breakdown of their marriage to help them settle their differences without resorting to litigation. The rationale for this is clear and unarguable. The adversarial process, with its pitting of one spouse against the other, can immeasurably aggravate the hostility and trauma associated with marital breakdown and is, in any event, unlikely to resolve the real dispute between the parties. An alternative process by which couples are able to negotiate agreements on matters in contention also represents a considerable saving for the community as a whole. The adversary system with all the paraphernalia of courts etc is expensive to maintain. Indeed, the idea for Family Law Centres arose in part out of a concern expressed by the then Attorney-General, Senator Evans, over the spiralling costs of legal aid in family law matters. Family law matters account for up to 70 percent of the federal legal aid budget. Many of these matters cost under $500, indicating that they were either small disputes or ones which were capable of resolution without a court hearing. The quest is then to find a less distressing and less expensive way of reaching a settlement.

The Family Court has strenuously pursued a policy of conciliation since its inception. Its counselling service has proved to be singularly successful, achieving a resolution of disputes in upwards of 70 percent of cases involving custody and access problems. The court's registrars also conduct conciliation conferences in financial matters and they have achieved a similar success rate. Lawyers have played their part too, although some have found it difficult to wean themselves off the adversial process.

So, if the Family Court has been so successful in its conciliation services, why direct resources which the court desperately needs into an entirely new and experimental project? It was felt by many that because these conciliation services were housed within the court they were often reaching parties too late to be of maximum benefit. While the counselling service has been increasing its 'off the street' work, many parties do not come in contact with counsellors or registrars until legal proceedings are on foot. This may be many months after the separation and the dispute may have grown markedly during that period, particularly with the filing of applications and the exchange of bitter affidavits. One of the ideas behind the Family Law Centre proposal is to lift the conciliation processes out of the adversary system and move them temporally in front of it. These centres would, as it were, be a 'front door' to the legal system.

Statistics from the Family Court also indicate that only about one-third of all divorced people come to court about their property or children. While it may be a sign of success that the other 70 percent are able to work matters out between themselves, there is concern that some may be acting in ignorance of their rights or may need outside assistance but are not seeking it. They may not approach the Family Court because they think this would only provoke their spouse, or because they cannot afford a lawyer or because they have a pre-conceived notion that the Family Court is only about litigation, judges, court rooms etc. A community based shopfront service may be both more accessible and less threatening to these people.

Finally, there was also a concern that the Family Court was simply not appropriate for some problems. For example, many people think that problems with access and sorting out of the division of household goods are too small for the Family Court and the legal system to handle. A Family Law Centre may provide a quick and efficient way for solving these. This aspect of the Centre's operation has a direct impact on the Commission's reference on contempt.

Discussions to date have provoked considerable interest and controversy about the need for these centres and their proper role. The potential use of lay mediators has concerned many lawyers and professional counsellors. They say that the legal and emotional problems surrounding marital breakdown are too complex for non-professional people to deal with. Others have argued that the experience of the NSW Community Justice Centres shows that lay mediation does have a role in less serious disputes, such as over access. They feel that in less serious cases people will be less defensive with mediators who do not have professional qualifications. Some lawyers and counsellors have disagreed with the assumption that conciliation services will be more effective outside the court system, saying that the close involvement of lawyers, counsellors, registrars and judges reinforces and strengthens the role and the effectiveness of each. They argue that the way to make the system more effective is to pump more resources into it, rather than to set up an entirely new and separate process.

These sorts of differences in view can really only be worked through by trying the concept out in a pilot scheme, as is now happening in Wollongong and Dandenong. The Federal Government has set aside funds to carry out a thorough ranging review of the Centres and the future of the whole concept will then be re-evaluated. However, Family Law Centres appear to be a thoughtful innovation in a jurisdiction which has been buffetted by violence and ill-directed criticism.

cultural clash and family law. Gone are the days when the differing cultural and racial backgrounds of Australians were to be dissipated in the great melting pot of Australian society. Since the early 70s, successive federal and state governments have actively encouraged the retention of separate cultural and racial identities within the community. Government policies and programs have been adjusted to take account of differing cultural and social attitudes. There is no doubt that Australian society has been greatly enriched by trading in the old melting pot for this cultural mosaic.

The institution of the law has, by contrast, largely stood above these social changes. While efforts have been made to ensure the greater availability of interpreters within the court system, the law continues to apply without distinction from one citizen to the next and regardless of any differing cultural or social views of justice. Nowhere is this more marked than in relation to the law governing personal relationships and family life. For example, in the Muslim tradition a man may take more than one wife and may readily divorce any of them by turning thrice on the spot. Whereas in the Judeo-Christian tradition monogamous marriage is the rule and for some sects this union is indissoluble. There are also sharp differences in attitudes from one cultural group to the next towards the position of women within marriage, the rights and obligations of children and the entitlements of spouses to property both during and at the end of their marriage. In countries where there are a number of large fairly self-contained communities, such as in Malaysia, parallel family law jurisdictions drawing on the differing traditions of each community operate side by side. With our more integrated society and smaller concentrations of particular ethnic groups, it may not be desirable or feasible for Australia to go this far. Nonetheless there is a real question as to the extent to which our legal system should recognise the differing cultural and social values of litigants.

This question was recently considered by the Full Court of the Family Court in *Goudge v Goudge* (1983) FLC 91-534 in relation to the custody of three part Aboriginal children. The children's father was of European descent and

their mother of mixed race. The father, who had a new de facto partner, offered the children the home environment and financial security of a typical white Australian nuclear family. There was some evidence that the father would actively seek to down play the children's racial background, bringing them up 'just like any other children'. The wife on the other hand was offering a more Aboriginal environment to the children. She lived amongst her extended family in Darwin and her relatives took the children on hunting and crabbing trips to traditional Aboriginal areas and introduced them to aspects of Aboriginal culture. The trial judge decided that the children, one of whom had learning difficulties, would fare better in the more stable and disciplined environment of the father's home. The wife appealed on the ground that the trial judge had not given enough weight to the Aboriginal identity of the children and to the evidence that in the father's custody their sense of this identity would be lost. The court (Ross-Jones and Strauss JJ; Evatt CJ dissenting) dismissed the appeal. The majority held that the Family Court should not make value judgments as to the merits of differing cultural, religious or ethnic heritages. The ultimate question for the court must be what arrangement best suits the children's overall welfare. Each case has to be decided on its own facts and cultural or racial identity is but one factor amongst a number, including the personalities and parenting capacities of each party. The majority thought that the wife's case might have been stronger if she had been living in a tribal area and offering a stronger Aboriginal alternative rather than living in Darwin where the contrasts between white and black society are less marked.

In her dissenting judgment, the Chief Judge agreed with the majority that the court should not as a matter of policy prefer one culture over another in deciding custody. Justice Evatt said however that this cuts both ways. While the court must not positively discriminate in favour of a minority culture, equally it must ensure that under the guise of the welfare principle it is not imposing Anglo-Saxon values on other ethnic groups. Her Honour quoted the following passage from the Commission paper on Aboriginal Customary Law: Child Custody, Fostering and Adoption (ALRC RP 4):

> There can be little argument that the 'welfare principle' should apply in cases of custody of Aboriginal children. The problem, however, is who decides what is in the best interests of an Aboriginal child and what standards are used in reaching this decision. The view has been put to the Commission that 'European concepts of child care embodied in the law are used to transfer legal guardianship of children away from Aboriginal communities'. These 'European concepts' are seen as being inappropriate and even irrelevant in determining what is an Aboriginal child's best interests.

Justice Evatt thought that where a person is seeking to transfer a child from one culture into a family of another culture the threat this may pose to the child's cultural identity must weigh heavily with the court. However she cautioned that this approach could not be directly transcribed to cases involving children from mixed racial backgrounds, as was the case here. Nevertheless in Her Honour's view cultural factors had to be given weight in deciding the welfare of mixed race children as well. While neither culture is to be preferred over the other, both must be seen as of importance to the children's upbringing and the implications of any order for their continuing connection with each culture needs to be considered.

The Chief Judge also said that the importance of Aboriginal identity to these children could not be viewed in isolation from what had happened to Aboriginal culture over the last 200 years. She referred to the Report of the Royal Commission on Human Relationships which identified the breakdown of traditional patterns of tribal and family life as one of the most serious affects of white settlement. The Report expressed the belief that:

> There is a continuing obligation to assist Aborigines to find a place in Australian society, a place of their choosing which maintains their identity and independence while allowing equality of opportunity in all fields.

Justice Evatt concluded that contrary to the husband's beliefs, the activities and the lifestyle

of the wife and her relatives were not to be seen as the remnants of a vanishing culture which will be obliterated in time by the process of assimilation. They are to be seen as part of the sense of identity and development of the children, part of their links to an Aboriginal culture and heritage which comes to them through their mother. In her Honour's view, the failure of the husbands to recognise this and to encourage these links should have weighed in the trial judge's decision about custody.

costigan & beyond

In a way beset with those that contend, on the one side for too great liberty and on the other side for too much authority, 'tis hard to pass between the points of both unwounded

Thomas Hobbes

The Costigan Royal Commission on the Activities of the Federated Ship Painters and Dockers Union presented its Sixth and Final Report to the Victorian and Federal governments on 26 October, 1984. Letters Patent had been issued in September 1980 but varied in June 1981, April and December 1982, February and December 1983 and then June 1984. The scope of the Commission's investigations was significantly extended during its course, eventually covering all parts of Australia and strata of society. To assert that controversy has surrounded the Final Report would be more pregnant of understatement than originality. Reaction has been polarised. Critics have claimed that in its zeal to identify organised crime in Australia, the Costigan Commission was contemptuous of civil liberties and ignored elementary principles of natural justice. They have said too that its proposals for a new criminal investigation regime paid insufficient attention to the regulation and accountability of the police. Supporters have claimed on the other hand that thieves and drug-runners should not be protected by 'legal niceties' and have pointed to the invasions of civil liberties perpetrated by criminals of the kind the Costigan Commission investigated.

The controversy which has been generated by the Final Report and Kerry Packer's involvement in the fracas has served to some extent to draw attention away from the important achievements of the Commission. Undeniably, it has highlighted the value of computerised technology in the fight against organised crime. This technology will be taken over by the National Crimes Authority. As a result of the Commission's Fourth Interim Report in July 1982 dealing with 'Fraud on the Commonwealth Revenue', two Special Prosecutors were appointed Mr Roger Gyles QC was charged with the task of dealing with the 'bottom of the harbour' tax schemes and Mr Robert Redlich dealt with criminal matters arising out of the confidential sections of the Report. Considerable sums have been returned to the public purse as a result and it has been claimed by some that Australia's tax evasion industry in the process has suffered its cruellest ever blow.

However, the Sydney Morning Herald has reported the New South Wales Premier, Neville Wran, as having declared that the credibility of the Costigan Commission 'has been shattered' by the finding of a Queensland coroner that the death of Brisbane bank manager, Mr Ian Coote, was due not to 'foul play' but suicide. It had been suggested by the Commission that Mr Coote, linked in the media as a business contact of Kerry Packer, had been murdered. A number of expert witnesses before the inquest denied that this was possible. Mr Wran is quoted as saying of the Costigan Report, parts of which were leaked in the National Times:

> People's names and reputations were sullied without any attempt being made at all to see who was responsible for the leaking of confidential material. You can't condemn a journalist for wanting a scoop or information that's not available to anyone else but I am highly critical of the people who make confidential material available in that way because it does such great harm to individuals and the whole fabric of society.

A number of issues relevant to law reform arise out of the Commission's Reports:

- The Costigan Commission, like the Stewart Royal Commission and the neonatal National Crimes Authority, is still another of the ventures by government