

Some of the questions raised by the Reference include:

- * Should we all be potential donors unless we opt out or should only those who volunteer be available?
- * What is "death" and who should determine it?
- * What procedures for consent for use of organs and tissues should be used?
- * What limitations should exist, if any, on experiments?
- * Should a national register of donors be established?

This is a classic case where international comparative law can suggest solutions. The Commissioner in charge of the project, Mr. Russell Scott, has already accumulated legislation from overseas. This includes not only our traditional sources in England and North America. Legal systems as different as those in Hungary, Brazil, Finland and South Africa all have legislation to cope with these problems. Some States in Europe seem to have taken the plunge to permit the State to override the wishes of relatives. Is Australia ready for this?

This Reference also illustrates another important development of law reform. Interdisciplinary work between lawyers and other professions has been sadly rare in Australia. The A.L.R.C. Report *Alcohol, Drugs and Driving* demonstrates that it can be done. In that case, the Attorney-General appointed eleven consultants from all over Australia. Their disciplines ranged from social work to traffic safety and from instrument technology to inorganic chemistry. As well, experts in community medicine sat down with forensic scientists and policemen. Similar interdisciplinary contacts are being forged in the Human Tissue Transplants Reference. Public debate of the sensitive issues involved will be encouraged in the media and by public sittings of the Commission. Mr. Justice Kirby and Mr. Scott have already seen the A.C.T. Legislative Assembly and discussed the Reference with Members. Because of the urgency of securing legislation in this area, the Attorney-General has fixed a deadline for report of 30 June 1977. He has also asked the Commission to consider proposals for uniformity between laws of the Territories and laws of the States in this area.

Insurance Contracts : Reform the jumble?

"If the law relating to Consumer Credit can be rationalised, it is difficult to see why the law of insurance should continue to rest mainly on a jumble of unjust precedents".

- (1975) 38 Mod.L.Rev. 89

Although the Australian Constitution, s.51(xiv), confers on the Commonwealth a wide power in respect of insurance, Commonwealth legislation in Australia has been fairly specialised. There is the Marine Insurance Act 1909 and the Life Insurance Act 1945. Recent legislation dealing with insolvency of insurers and registration of probate only scratches the surface of the private law of insurance. Generally speaking, we all go back to Macgillivray or Ivamy or other English texts. Perhaps this is about to change.

On 9 September 1976 the Commonwealth Attorney-General, Mr. Ellicott, gave the A.L.R.C. a wide Reference on Insurance Law. The Reference followed discussions with the Treasurer, Mr. Lynch, who has ministerial responsibility in Australia for insurance legislation.

Announcing the assignment to the Law Reform Commission, Mr. Ellicott said that present insurance laws were developed when the theory of "freedom of contract" was predominant. Unequal bargaining power has tended to mean in fact that the insurer is in a favourable position, compared with the insured. In such a situation,

it is necessary for the law to keep pace with the conditions that exist in today's society. If, because of unequal bargaining power, unfair conditions are imposed on the insured, legislation is needed to remedy the inequality. The Federal Attorney-General likened the problem to other areas of consumer protection. Mr. Ellicott stressed that he did not believe that there are "grave abuses evident in this area" but the A.L.R.C. was asked to consider the matter so that the Government could determine whether it should legislate in relation to it.

Mr. David St.L. Kelly, formerly Reader in Law at the University of Adelaide, has been assigned as Commissioner in charge of this Reference. Mr. Kelly told "Reform" that the Reference called particular attention to the following aspects of Insurance contracts:

- * Unfair terms and conditions
- * Terms and conditions that should be mandatory
- * Terms and conditions that should be prohibited
- * A possible statement of rights and obligations for the insured
- * Arbitration clauses.

Mr. Kelly said that the Commission would approach consumer groups, the insurance industry and the community generally to get views on the scope and nature of the problem.

"The Reference excludes marine insurance, workers' compensation and compulsory third party insurance. There are other constitutional limitations. Nevertheless, what remains is an important area of insurance law. The Reference provides an opportunity for an Australian response to the private law of insurance contracts", Mr. Kelly said.

As in other references, the Attorney-General has asked the Commission to have regard to its function to consider and present proposals for uniformity between the laws of the Territories and laws of the States with a view to such proposals being considered by the States. It is interesting in this respect to note that the Western Australian Attorney-General has now given the W.A.L.R.C. a Reference on Privacy that parallels the National Reference given to the A.L.R.C. by Mr. Ellicott. The two Commissions are already making arrangements to work closely on the project which may represent a breakthrough for the development of uniform laws in Australia. Mr. Justice Kirby said that the "inadequate" machinery for promoting and servicing uniform laws in this country would be dealt with in the A.L.R.C.'s *Second Annual Report* to Federal Parliament. This Report will be tabled in October 1976.

Rape : The debate continues

"..[R]ape is a most detestable crime, and therefore ought severely and impartially to be punished ...; ... it is an accusation easily to be made and hard to be proved, and harder to be defended by the party accused, tho never so innocent..."

- Sir Matthew Hale C.J., *Pleas of the Crown*, I, p.634

Dr. John Helmer, a Senior Lecturer in Political Science, is reported in "The Age" (10 September 1976) as saying that rapists in Victoria have an 80% chance of avoiding conviction. He asserts that a legal system that permits this, favours rape as a "better gamble than risking V.D. by going to a massage parlour". A number of law reform reports have now been delivered suggesting rape law reform. In the last quarter, an important Report from the Victorian Law Reform Commissioner, Mr. Smith Q.C., proposes substantial changes in court procedures and rules of evidence in Victoria. There have been earlier reports from the Tasmanian Law Reform Commission, the South Australian Criminal Law Committee and the Women's Advisory