

our jurisprudence. An editorial in [1980] 4 *Criminal Law Journal* 197 points to the confusions which arose from the attempts of the English court to 'divide the kinds of mens rea necessary to be proved in criminal cases into two classes of specific and basic intent:

Nothing but confusion has reigned since the various attempts by the courts to specify what is meant by these two forms of mens rea.

Laymen were less kind to the majority and many expressed astonishment that such a decision could be arrived at. The *Sydney Sun* (23 June 1980) lamented:

It will be greeted with alarm by a public already disturbed by an apparent imbalance of law in favour of wrongdoers over the interests of their victim. ... Some lawyers see the decision as correct and logical. With such a divergence of expert opinion, the public — with one eye on the floodgates — will expect the drunk's defence to be kept under the tightest possible legal restraint.

The Sydney Morning Herald (23 June 1980) was more acerbic:

Judges are not bound to express the current wisdom on social policy. Nor should they ignore it — especially in a way that seems, on the face of it, to be at variance with common sense and common sensibility. The days when this country had a blind spot as far as alcohol was concerned ... have — it may be hoped — passed.

In Victoria the Attorney-General, Mr. Storey, pointed out that the High Court majority had suggested the possibility of new types of offences. 'I consider' he said 'that it requires very serious consideration'. He said that any new offence created would 'cover the situation where somebody commits what would otherwise be a crime, but for the fact that he was so intoxicated at the time he committed it'. He also pointed out that the case was limited to 'very rare cases where a person was incapable of forming an intention to commit a crime'. O'Connor's case arose when O'Connor stabbed an off-duty policeman who caught him interfering with a car. O'Connor's defence was that he had been taking a drug and drinking alcohol and had no recollection of what happened.

If Sir John Minogue is to tackle this subject, in addition to those upon which he is working

now, further welcome extensions of his term of office can be contemplated! At the time of announcing Sir John's extension, Mr Storey pointed out that his recommendations on *Pre-Incorporation Contracts* had been included in one of the draft Companies Bills recently released by the Federal Government for public comment. That Bill will form part of the basis of uniform companies law throughout Australia, establishing the utility of Sir John Minogue's work for other jurisdictions as well as Victoria.

In September 1980 reports appeared in the press that the Victorian Government planned amendment of the Crimes Act to reform certain references to homosexual offences and to change the provisions in relation to punishment for the crime of rape. Although the Labor Opposition, through its Shadow Spokesman Mr J. Cain, has indicated general agreement to the proposal, opposition is being voiced in some political quarters and from various Church groups. The *Melbourne Age* (8 September) praised the proposed reforms as 'long overdue', claiming that the law 'has been left way behind by the community' because Victoria's parliamentarians have been 'so frightened of upsetting the conservative section of society that they have made an ass of the law'. But the paper lamented that the subjects of prostitution and incest law reform had not been tackled at the same time.

bio-med again

When the artless doctor sees
No-one hope but of his fees

Robert Herrick, *Litany to the Holy Spirit*, c.1654

It is comforting to read that concern about medical fees long ante-dates Medibank. But far transcending issues about fees today are the questions of whether doctors are truly 'artless' and whether they 'see' clearly the social consequences of enormous recent advances in medical technology. The age of computerised hospital surveillance is with us. So too is the age of:

- human tissue transplants
- test tube babies
- artificial insemination
- genetic manipulation

is the law ready for all this?

Human Tissue Transplants. Good news on this front. The ALRC report on '*Human Tissue Transplants*' is slowly but surely receiving acceptance throughout Australia. Already in operation in three jurisdictions (A.C.T., Queensland, Northern Territory) the last few weeks have seen a report by a Victorian Working Party established to examine the draft Ordinance attached to the ALRC report No 7. The report was established by the Attorney-General after consultation with the Minister of Health. The convenor of the committee, Mr. H. W. Pascoe, was a former Coroner. The report, now made public for comment and criticism, recommends that subject to various specific amendments, the draft legislation proposed by the ALRC should be incorporated in Victoria, including legislation on autopsies and related matters. It urges that 'the legislation be enacted as soon as possible in order to overcome difficulties being encountered by the medical profession at the present time'. One significant point upon which the Victorian report urges a departure from the ALRC (majority) report relates to donations by young persons of non-replaceable organs. Explaining the stand (which is also reflected in the Queensland and Northern Territory laws) Mr. Pascoe is reported to have said that 'what may be regarded as a beau geste by a 12-year-old today may be regarded as most regrettable later in life'. The ALRC majority had proposed, subject to various precautions (including judicial supervision) to permit such donations in a family predicament. In addition to the Victorian report, it is understood that in another State, a Cabinet submission is now being prepared. In England *The Times* (2 July 1980) reports that Dr Gerard Vaughan, Minister of State for Health, had ruled out the case for 'opting out kidney donor systems'. Whilst acknowledging that 1,700 people were waiting who could have kidneys, if kidneys

were available in the United Kingdom, Dr. Vaughan referred to a public opinion survey in 1979 which came out against 'opting out' as did the ALRC report. Australian legislation adopts the compromise of a simplified procedure for donor/relative consent.

Definition of death. One of the most pleasing features of the gradual adoption of the ALRC report is the uniform adoption of the proposed new statutory definition of 'death' contained in the report and suggested for 'all legal purposes'. The Victorian Pascoe report is full of praise for the ALRC approach, which suggests the addition of a 'brain death' definition under certain procedural protections:

We are of the view that ... the definition of death should be incorporated in the Victorian legislation. We consider it to be highly desirable and are of the view that the legislative enactment should not have added to it any criteria for tests. We consider that such criteria may in time become redundant with anticipated developments in medical science.

In South Australia a Private Member's Bill has been introduced and referred to a Parliamentary Committee concerning the right of persons, in their lifetime, to rule out extraordinary life supporting procedures. A revised version of the Bill contains a statutory definition of 'death' different from the ALRC proposals. In response to an invitation, the ALRC has pointed to the undesirability of incorporating (as the Bill does) reference to BMA tests to determine death. In this area, medical technology is progressing so quickly that tests which, less than a decade ago, were prerequisite to diagnose irreversible loss of brain function, have now been replaced. It is to be hoped that a uniform definition of 'death' can be adopted throughout Australia for all purposes of the law.

In vitro fertilisation. The birth in Melbourne in late June 1980 of Candice Reed brought home to many Australians the advent of test tube fertilisation. Candice was only the fourth such 'test tube baby' ever born. She has been born into an Australian legal system which has not begun to cope with the legal and moral implications of science-assisted conceptions. In Sydney, *The Sydney Morning Herald*

(26 June 1980) acknowledged the brilliance of the medical techniques and the raised hopes of infertile parents. But it pointed to other issues:

- the extent to which man is entitled to interfere with or depart from natural reproductive processes
- the present huge costs of test tube babies as an allocation of resources
- the implications for further experimentation e.g. the production of humans by other selective and unnatural means and the 'spectre of human cloning'

The solution posed by the editor was a thorough inquiry:

The issues posed by the birth of Candice are so profound and complex that they call for a dialogue [between researchers and society] and for moderation in the further application of this research until the public has had a chance to catch up with and sort out the issues. The very fact that the birth has caught the Federal and State Governments unawares ... of itself offers a strong argument for a pause.

Artificial Insemination. The legal issues of artificial insemination have been referred by the Standing Committee of Attorneys-General to the NSW Attorney-General, whose officers are preparing a report. It is envisaged that this will propose uniform legislation throughout Australia on the legal consequences of AIH. As announced, it is understood that the scheme will be limited to cases where the donor is the husband of the woman recipient. The fact remains that artificial insemination (for default of children for adoption) is now a large and growing medical industry. Cases involving donors external to the marriage are very numerous. The legal problems arising include:

- obligations to inform marriage partners
- entitlements to identification of donors
- obligations to keep medical records to trace genetic diseases
- passing of property
- removal of disadvantages of illegitimacy
- rights of donors, including non-husbands

In the Council of Europe, a committee of experts has drafted a recommendation 'On

Artificial Insemination of Human Beings'. This has been adopted by the European Committee on Legal Co-operation and a number of basic rules laid down for adoption in the member countries. It is to be hoped that Australian laws dealing with this subject will be comprehensive and, like the ALRC proposals on human tissue transplants (now gaining widespread acceptance) debated thoroughly in the public forum. This is not a subject for lawyers only. Nor, let it be said, is it a subject only for the medical profession.

Addressing these dilemmas, the Governor-General, Sir Zelman Cowen, told a Graduation Class at the Joint Services Staff College in Canberra on 19 June, in the context of scientific developments generally:

[I]t is surely the case ... that if nothing is done to adjust the legal system to these scientific developments, things will not just remain the same. Inconveniences and perceived injustices will occur because old rules of law become irrelevant or positively obstructive or because situations have arisen affecting members of society, upon which current laws are perfectly silent. I may add that pressures within particular sections of society may well build up a formidable head of steam and responses dictated by the generation of urgent pressures do not assure orderly development or resolution.

odds and ends

■ The doyen of law reform and first Chairman of the English Law Commission, Lord Scarman, visited Australia in September 1980. During the course of his visit, on 12 September, he called on the ALRC. Collected to meet him were Commissioners of the NSWLRC, Tas LRC and ALRC. Also present was Mr. Terence Purcell of the N.S.W. Law Foundation and leading representatives of administrative law reform in Australia. Mr. Justice Brennan (the first Chairman of the Administrative Review Council, and a past ALRC Commissioner) joined Mr. Justice Davies (President of the AAT), the Commonwealth Ombudsman (Professor J. Richardson) and the current Chairman of the ARC (Mr. Ernest Tucker) in