

so incompetent, that they didn't address the serious social and ethical consequences of what they were up to.

miscellaneous. In closing this item, two additional reports:

- The *Times*, Law Report, 20 February 1982, carries the report of the English Court of Appeal in *McKay v. Essex Area Health Authority & Anor.* The appeal judges held that the common law did not recognise that a person had a right of action for being allowed to be born deformed. The court unanimously so held when allowing an appeal from a decision which had in turn reversed an order of a Master striking out a claim of an infant as disclosing no reasonable cause of action. The claim in question was that the infant 'had suffered entry into life in which her injuries are highly debilitating and cause distress, loss and damage'. The child suffered disability because her mother was infected with rubella in the early months of pregnancy. The claim of 'wrongful life', developed in the United States, was rejected. Lord Justice Stephenson asking 'how could there be a duty to take away life? How could it be lawful? It is still the law that it is unlawful to take away the life of a child born or any living person after birth?'
- In the address to the National Science Forum on 4 March 1982, with which this item begins, the ALRC Chairman drew attention to discussion in recent United States law journals about the legal implications of human cloning. See, for example, P.D. Turner, 'Legal and Ethical Implications of Artificial Human Procreation', 58 *Uni. Detroit J. Urban L.* 459, 482 (1981). According to United States estimates, human cloning would be technologically possible within 10 to 20 years. Clones of other mammals have already been produced. The ALRC Chairman listed a number of legal questions, including as to the legal relationship between the clonist and clonant, ie whether they would be sibling,

parent and child or a different relationship requiring new legal treatment:

The lesson of science and technology for the law is that its developments tend to happen very rapidly — sometimes overnight. One morning we wake up and the newspapers proclaim a 'test tube baby'. Smiling parents and doctors reassure us that all is well. So far, perhaps it is. Will we have the same reaction if one day, within the next 20 years, we wake up to find that the remarkable scientists have gone beyond cloning frogs, mice and prize cattle? Will the television pictures of the first cloned human being fill us with delight, fear, horror, awe? Without legal regulation it is sure that scientists somewhere will continue the experimentation. Meanwhile the law and lawmakers sleep on this subject.

odds and ends

■ **foreign report.** The first report of the Law Reform Commission of Nigeria, 1980, is now to hand. It sets out the qualifications of the Commissioners and outlines the methodology and program of the Commission. The first item on the agenda is a review of the Marriage Act, complicated in Nigeria by the differing secular and Islamic approaches to the subject. The report contains a complaint that will be familiar to all LRCs that 'the administrative cadre is greatly understaffed' and 'the finances of the Commission . . . grossly inadequate'. Also from Africa comes the first Annual report of the Zimbabwe Advisory Committee on Law Reform, 1981. The first Chairman of the committee is the Chief Justice of Zimbabwe, Mr. Justice Fieldsend, who was one-time Secretary of the Law Commission for England and Wales. The Annual Report indicates an intention to proceed by working papers and a detailed report on progress is given in the projects now under consideration. These include the problem of habitual criminals, aspects of capital punishment, civil imprisonment and civil procedure and evidence. Specific mention is made of the 'friendly connections with the ALRC, Law Com and the Legal division of the Commonwealth Secretariat. Something of a record in law reform implementation is achieved by the prompt introduction into the Legislative Council of Hong Kong of the Arbitration (Amendment) Bill 1982 based on the first report of

the Law Reform Commission of Hong Kong. The Bill was introduced by Mr. John Griffiths QC who, with Sir Denys Roberts, Chief Justice, is Joint Chairman of the Hong Kong LRC. The aim of the Bill, as of the report, is to streamline arbitrations and reduce the scope for legal appeals. In a speech given at a function in Hong Kong on 15 February 1982, Mr. Griffiths outlined the aims in setting up the Hong Kong LRC:

First, we wanted to obtain practical solutions to real problems. The only way to do this is to obtain the help of those with detailed experience and knowledge in the field being studied. Second, it was essential that the views and feelings of our community should be represented and taken into account when solutions were proposed. . . . Contrary to popular belief, it is my opinion that sensible law reform should not be left entirely in the hands of lawyers, but should also have an input from the community itself. Law should not be a mystery. It is the frame which holds up the society in which we live. There is no substitute when constructing or repairing that frame for drawing on the experience, common sense and ability of men and women of affairs who are interested in the society in which they live.

The Hong Kong LRC is looking to how other jurisdictions tackle problems with their laws and China, England, Singapore and the USA are specifically mentioned.

■**cost benefit.** An interesting book published by the Department of Law in the Research School of Social Studies of the Australian National University is *Law and Economics*. Edited by Ross Cranston and Ann Schick and issued in 1982, the book contains a number of essays on the economics of law reform. One, by Professor Maureen Brunt and Dr. Allan Fels (Monash Uni) outlines an economic examination of class actions. Another, by Dr. Peter Swan, scrutinises the ALRC reports on *Human Tissue Transplants* and *Insurance Agents and Brokers* from the viewpoint of a theoretical economist. Dr. Swan's solution to many legal problems is a reliance on market mechanisms, even for the sale of, and trading in, human tissue: something which the ALRC felt should be forbidden, for other reasons of public policy. The need to take into account both legal and economic disciplines is stressed by Dr. Ross Cranston in a comment. The need to have regard to equity as well as efficiency is

stressed but so is the need for lawyers to 'take economic factors into account along with others'. The forthcoming ALRC report on *Insurance Contracts*, in response to the detailed Treasury submission on the discussion paper, contains the most comprehensive ALRC statement yet on the proper approach of law reformers to cost/benefit considerations.

■**family law.** In [1982] *Reform* 24 this journal erroneously recorded that it had been announced that Professor David Hambly of the ANU would be Chairman of the committee to examine laws on marriage property. In fact, the Federal Attorney-General's announcement about the committee to the Australian Senate on 13 October 1981, whilst indicating the intention to establish an 'ad hoc committee of inquiry', did not name the Chairman or members. The membership of the committee has not been announced to the date of publication. The error is regretted. Meanwhile, some other proposals of the report of the Joint Select Committee on the Family Law Act have been promptly followed through. Recommendations 4 and 41 proposed dual judicial commissions for judges of the Family Court of Western Australia in the Federal Family Court of Australia. A ceremony in Perth in February 1982 marked the issue to Mr. Justice Alan Barblett, Chief Judge of the WA Family Court of a Federal commission. The judge is also Chairman of the Family Law Council of Australia. The success of this venture in joint commissions will be closely watched for its relevance to solving 'border conflicts' between Federal and State courts more generally. Finally, a proposal to permit uncontested divorces to proceed without requiring parties to attend a hearing is under consideration of Federal Parliament. Objections have been lodged by the Law Council of Australia and reservations have been voiced by some Senators. The *Melbourne Age* (4 December 1981) asked whether the Law Council's opposition was 'less concerned with the sanctity of marriage than with the preservation of lucrative work for its members'. According to the *Age* 'this sensible reform should not be impeded by self-serving humbug'.

■ **Industrial relations reform.** An important speech by the Federal Minister for Industrial Relations, Mr. Ian Viner, to the American Chamber of Commerce in Australia, Brisbane branch, on 4 November 1981, did not secure the widespread coverage it deserved. Mr. Viner called attention to the needs for careful exploration of the Federal Constitution with respect to industrial disputes. He claimed that 'the Constitution is more dynamic than many people think':

The use of the trade and commerce power of our constitution for industrial purposes may give scope for the creation of new industrial law in Australia. It has been little explored but has very much potential because, as I have always believed, industrial relations is inextricably linked to the interest of the public in protecting the free flow of trade and commerce for the common good.

Mr. Viner claimed that the institutionalisation of conciliation and arbitration in Australia had slowed the achievement of dispute settling procedures and the introduction of more collective bargaining in Australia. In a note of general significance for law reform, he declared that 'it serves no purpose to ring our hands in false exasperation that our laws cannot be changed. They can be — at State and Federal level'. However, on 22 February 1982, the Prime Minister, Mr. Fraser, revealed that six State Premiers had rejected an offer from the Federal Government to allow the Commonwealth to take over full authority for industrial relations in Australia. In a comment on this latest decision for non-action, the *Sydney Morning Herald* (24 Feb 1982) observed:

Despite the seven unsuccessful referenda; the failure of governments to act . . . ; the frustrations of the last two years — despite all these things, other . . . men and women will emerge to take up the cause again. Such people, who refuse to accept the absurdities of Federal/State union rivalry, differential treatment, wage 'leapfrogging' and other legacies of our present system will finally achieve what Mr. Fraser and Mr. Wran have failed to do. Unfortunately, most of us won't be around to share in the benefits.

■ **new books.** Three new books released in the last quarter deserve the attention of law reformers:

- '*Mental Retardation Law, Policy and Administration*' by Susan C. Hayes and Robert Hayes (ALRC

Commissioner) contains the first Australian analysis of law governing mental retardation, including such practical matters as social security benefits and subsidies, financial and property management and education rights. The book was launched in Sydney in February 1982 by State Attorney-General, Frank Walker QC. Mr. Walker pledged the NSW Government to action a number of laws, where reform needs are identified in the book.

- '*Residential Tenancies Handbook — Victoria*' by Gim Teh (Monash Uni) published by Butterworths and released early in 1982 examines the new Residential Tenancies Act 1980 of Victoria. It does so in language which will be understandable to laymen, such as landlords, tenants, estate agents and social workers who have to find their way through the intricacies of the Act. Of most interest to the law reformer is the introductory chapter on the background and significance of the Act. This reviews the law reform debates which led up to the legislation. According to Mr. Teh 'the community consultative aspect is likely to remain an eye-opener. It has shown how law reforms affecting the average person in the street should be carried out. . . . The Law Institute has shown that lawyers stand on the side of landlords, estate agents and other investors, in law reforms such as this. . . .'
- '*Teaching Human Rights*' is published by the Australian National Commission for UNESCO. The General Editor, Professor Alice Erh-Soon Tay (now an ALRC Commissioner) has collected the series of papers presented to a UNESCO seminar held in the Sydney Law School in June 1980. Interesting contributions are offered by the former Prime Minister, Mr. E.G. Whitlam QC, Professor Peter Singer ('Why Are Human Rights For Humans Only?'),

Professor L. Chipman (who questions aspects of multiculturalism) and Mr. P.H. Bailey, now Deputy Chairman of the Human Rights Commission. The general thesis emerging from the book is that efforts should be made to raise the consciousness of Australian students about human rights issues, without making the mistake of indoctrinating them in a particular dogmatic view. According to one contributor, Mr. Justice Hope (NSW Court of Appeal) the 'lucky country' has produced a 'complacency, self-satisfaction, almost narcissistic in character. We are continuously looking at ourselves in a mirror, admiring the general blurred picture that our short-sighted eyes see'. This is an excellent collection of thoughtful articles which is well timed to coincide with the establishment of the Human Rights Commission. See [1982] *Reform* 21.

■ **capital territory reforms.** Although the Australian Capital Territory may no longer be regarded as a 'hothouse of social experimentation', it was equally important that its law reform needs should not be ignored amidst other national concerns. This was the message of the ALRC Chairman, when delivering the Canberra Day Oration in the Civic Square on 12 March 1982 on the 69th anniversary of the naming of the city. Despite the work of the new Criminal Law Consultative Committee (see [1982] *Reform* 35) Mr. Justice Kirby declared that the criminal laws of the ACT were 'in a shocking state — the product of long neglect'. He claimed that 'it must be frankly said that in the pecking order of national priorities, law reform, including for this Territory, comes rather low'. Mr. Justice Kirby urged consideration of the appointment of a specific Law Reform Commissioner for the ACT, as envisaged by the Law Reform Commission Act:

We should not be content with a city of splendid public buildings set in beautiful natural surroundings but governed by laws that are all too often the product of the years the locusts have eaten.

Meanwhile, the ALRC report on *Child Welfare*, which deals specifically with a contentious issue of law reform in the ACT, is still under close examination by official and non-official committees. The Member for Canberra, Mrs. Ros Kelly (Lab.) told the House of Representatives on 17 November 1981 that the issues dealt with in the report should be 'fully aired in the community'. She welcomed the report and pointed out that the issues dealt with in it were of 'great concern to the people of Canberra'. A major editorial in the *Criminal Law Journal* (Feb 1982, Vol 6, 1) is generally favourable. It claims that the report will 'certainly become a standard text for scholars in this field'. But it expresses the hope 'that its bulk and details do not deter legislators from delving into it also'. The editor acknowledges that there are few aspects of the report which are not controversial:

The most impressive thing about this report is that, unlike many others on the topic, it does not leave the impression that its authors have set out to justify a particular philosophy. Rather it confronts the issues directly, sets out the opposing views, and arrives at its conclusions after detailed examination of the available literature and other evidence. Even if some of the recommendations are *personally* unattractive, the report offers justification for them.

It now remains to be seen whether it leads on to early actual reform of the law but the Minister for the Capital Territory, Mr. Michael Hodgman, is known to be keen to expedite the procedures of law reform for the Territory.

new reports

Australia

- | | | |
|---------|------------------|--|
| ALRC | : <i>Evid.</i> | : Sworn and Unsworn Evidence 1982
RP 6 |
| NSWLRC: | <i>IP</i> | : <i>De facto</i> Relationships, and Summary, 1981 |
| | : <i>Bkgd</i> | : Solicitors' Trust Accounts and Solicitors' Fidelity Fund, 1981 |
| | <i>P V</i> | |
| QLRC | : <i>WP 24</i> : | Bill to Consolidate, Amend and Reform the Supreme Court Acts and Ancillary Acts Regulating Civil Proceedings in the Supreme Court, 1982. |
| VLRC | : <i>I2</i> | : Provocation and Diminished Responsibility as Defences to Murder, 1982 |