

and contain some reflections on institutional law reform. The Foreword by Lord Scarman, extracted at the head of this section, questions whether the 'all-embracing, universal approach to law reform is appropriate'. 'Is that the right approach to law reform?', he asks. Admitting that there are 'many doubting voices to be heard in the dark jungle of the law, some pessimistic and some petulant', Lord Scarman concludes that he 'needed no convincing' that the approach 'is absolutely right: that law reform serves no true social purpose unless it is to "take the whole body of the law" as Bacon put it, under review and to sustain the review indefinitely, calling for reform in this, that or the other part of the system as the review progresses'.

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'Death like birth is entry into an unknown country. The only access leads through a torture chamber and is therefore frightening. Death is becoming unborn again'.
Arthur Koestler 1905-1983

human issues. Before the Federal Election the incoming Federal Attorney-General, Senator Gareth Evans asked whether the Federal Attorney-General had made any decision concerning references to the ALRC on legal problems and issues associated with:

- in vitro fertilization
- embryo implantation;
- artificial insemination;
- surrogate parenthood; and
- genetic engineering.

Senator Evans asked whether the Federal Attorney-General would acknowledge that disuniformity of the law was likely to result 'unless a single national enquiry was conducted by the Australian Law Reform Commission'. Answering on behalf of the Attorney-General on 12 October 1982,

Senator F.M. Chaney said that the Attorney-General had decided that it is inappropriate to make a reference to the Law Reform Commission on the ground that 'the actual control of these processes is a State matter involving a wide group of Ministers'. Clearly the problems of bioethics are not confined to any particular State or even particular countries. They are human problems and a number of developments in the last quarter need to be noted.

Further progress has been made on the implementation of the ALRC report on *Human Tissues Transplants* (ALRC 7). In December 1982, the legislation based on the report was adopted in Western Australia. See [1983] *Reform* 27. In April 1983 the Human Tissue Act 1982 (Victoria) comes into force. Legislation based on the ALRC report is now in force in five of the eight Australian jurisdictions. Others are set to follow. The success indicates that progress can be made in Australia towards uniform laws, including in highly sensitive and controversial areas of bioethics.

In January 1983, the National Health & Medical Research Council of Australia announced the establishment of a special committee to deal with social, legal and ethical questions associated with medical research. The committee is to keep developments under review, to monitor the work of institutional ethics committees and to respond to requests by Ministers. Published during the last part of 1982 and now available is the NH & MRC 'Code of Practice for Transplantation of Cadaveric Organs'. A member of the working paper which developed the Code was Mr Russell Scott, Deputy Chairman of the NSWLRC and formerly Commissioner in charge of the ALRC project on human tissue transplants. The Code provides numerous detailed guidelines and references to State legislation. The latter have now been overtaken with the enactment of new laws based on the ALRC report in WA and

Victoria. The guidelines exclude the controversial issue of the use of foetal tissue, a matter also reserved by the ALRC.

test tube babies. On the eve of the West Australian election, the then Health Minister, Mr Ray Young announced the establishment of an enquiry into in vitro fertilization. Enquiries have now been established on this subject in NSW, Victoria, Queensland and WA. So far as is known, no steps are being taken to endeavour to co-ordinate the work of the various Australia enquiries on the legal and social aspects of IVF. Other moves in the last quarter on IVF include:

- announcement in the United States of techniques which enable embryos in the laboratory to be grown to the 'beating heart' stage when discrete organs such as the heart begin to develop, *The Australian*, 21 February 1983, 16;
- increasing evidence of the tendency of IVF to produce female rather than male babies. Only 16 of 51 IVF babies produced in Melbourne centres have been boys. *Age*, 3 March 1983, 3;
- a growing number of overseas couples are now coming to Melbourne and paying thousands of dollars to secure IVF treatment. *Age*, 1 February 1983, 5;
- serious discussion is now proceeding as to the extent to which parents should be able to decide by pre-birth tests the acceptable qualities of their offspring. Already this is done to some extent by amniocentesis procedures designed to disclose some cases of mental retardation and spinal bifida;
- the Presidential Commission on Medical Ethics in the United States has urged the establishment of national guidelines on the ethics of genetic counselling, because of the rapid development of new screening

tests able to disclose most lethal genetic diseases. *The Australian*, 2 March 1983, 9.

In fact, the remarkable developments of genetic engineering have led thoughtful spokesmen to call for a national approach to biotechnology in Australia. Speaking to a public meeting held by the NSW Humanist Society, Mr Russell Scott (NSWLRC) said that new developments and public speculation were increasing public anxiety:

'It seems to me that the establishment of a national standing committee with a broad representation, not just confined to doctors, lawyers and politicians, might be able to serve the purpose of providing some reassurance to the community. But it might not be sensible to have laws governing biotechnology, because they could inhibit legitimate research and experimentation. It is a terrible dilemma between allowing research to take place that might benefit mankind and giving too much licence, so that it gets out of control'.

An important Australian development, demonstrating the value of research, is the isolation by a group of Canberra and Melbourne scientists of the human hormone 'relaxin'. Announced in mid-February 1983, it was indicated that they had succeeded after 4 years research in producing, entirely by genetic engineering, a pure form of relaxin 'a hormone naturally produced in the ovary during pregnancy and childbirth and never previously isolated'. The discovery would lead to a lower incidence of brain injury and spasticity amongst babies as well as providing for easier childbirth. It may also be possible to devise an antagonist to relaxin with contraceptive advantages greater than 'the Pill'.

breastmilk substitutes. Close readers will recall that in the last issue of *Reform* it was mentioned that the ALRC Chairman, Mr Justice Kirby, was proceeding to Harare, Zimbabwe for a conference on breastmilk substitutes. Some unkind observers may have questioned his credentials. However, the conference, jointly organised by the Commonwealth Secretariat, WHO and

UNICEF, examined various ways in which legislation could help promote, in individual countries of the Commonwealth of Nations, restrictions on the sale and promotion of infant baby formula. Not only do these powders cause an expensive drain on the economic resources of developing countries. Increasing medical research indicates that they have numerous disadvantages when compared to breastmilk, not least the inhibition of ovulation that normally attends breast feeding. WHO figures show a most significant increase in the birth rate wherever breastmilk substitutes are promoted. Papua New Guinea in 1977 introduced the Baby Foods Supplies (Control) Act to prevent sales of bottles, teats and dummies without a prescription. The result has been a return to breast feeding and a significant fall in infant mortality.

Mr Justice Kirby outlined to the Harare conference the ways in which the ALRC has tackled medical and legal problems of human tissue transplantation in Australia. He suggested that public and expert participation were the key to legislative progress in areas involving complex medical, ethical issues. He suggested on his return to Sydney and subsequently repeated in the ABC program, the Science Show (5 March) the proposal that there should be greater co-operation between Commonwealth countries in medico/legal issues to help create a 'common law for today':

'The Commonwealth Secretariat could play an important leadership role. At the moment this leadership role in international problems of a legal dimension has passed, by default to the Council of Europe or the OECD – organisations lacking the participation of many Commonwealth countries and virtually all developing countries. By commissioning appropriate studies, organising appropriate meetings of experts, preparing model legislation and cultivating a discussion within the worldwide community of the Commonwealth of Nations, the common problems (or some of them) could be tackled. They could be addressed in a way appropriate to the universal nature of the human body and the ethical issues raised and the

international perspective that is possible only within the legal systems of the Commonwealth of Nations'.

mental health. That controversial subject mental health law reform is again in the news.

- In Wellington, NZ, it was announced on 14 February 1983 that the Mental Health Foundation would review all legislation affecting psychiatric patients. This followed the publication of a report on the Oakley Mental Institution which included serious criticism of the standard of care offered and raised broader issues about the treatment of rights of psychiatric patients in New Zealand. According to the Foundation, implicit in the report is the conclusion 'that the review of legal provisions relating to the admission, treatment and discharge of committed mental patients is well overdue'.
- In New South Wales the Mental Health Bill 1982 was introduced into Parliament and allowed to lie on the table. According to a report in the *Sydney Morning Herald* (4 March 1983) the State Minister for Health, Mr L. Brereton is contemplating amendments including provision for adequate services and facilities outside the formal system for patients who have been released for mental care. One psychiatrist told the *Herald* that the philosophy behind the Bill was to give a mentally ill person the right 'to go mad quietly as long as he does not pose a danger to those around him'. Although some psychiatrists have criticised the criteria for mental illness as being too strict, other observers have pointed to the loss of liberty involved in committal to a mental hospital, the large numbers affected and the unduly paternalistic and sometimes oppressive approach of the law in the

past. The Bill specifically makes it clear that the person is not to be declared mentally ill because of his political, religious or sexual preferences or because of 'immoral conduct' or drug taking. The sole criterion will be physical danger to the patient or those around him.

and death. The death in a suicide pact of Arthur Koestler, writer and philosopher in March 1983 drew attention once again to the law of euthanasia. Mr Koestler was the Vice-President of Exit, the British Voluntary Euthanasia Society. His thesis was that death could sometimes be a welcome and natural relief to someone whose only alternative was pain and suffering. At the time of his death, Arthur Koestler was suffering from leukemia and Parkinson's Disease.

The law continues to take a dim view of suicide and active euthanasia. In 1982 officers of Exit were sentenced to imprisonment in Britain. However, the year also saw some progress with the passage of reform of the law of suicide in NSW, more than 20 years after it was reformed in Britain and with growing public debate about the ethics of mercy killing. This debate has spilt over into the courts with discussions of the death of deformed or retarded neonates in *In re B (a minor)* [1981] 1 WLR 1421,; *R. v Leonard Arthur* noted (1982) 56 ALJ 139; and *McKay v Essex Area Health Authority* [1982] 2 WLR 890.

In Victoria, the Health Advisory Council at the request of the Minister of Health (Mr Tom Roper) is enquiring into a Private Members' Bill called The Right to Refuse Medical Treatment Bill 1980. The Bill provides that a person who has attained the age of 18 years and is of sound mind, may declare in writing that he is suffering from a fatal condition and that his life is not to be maintained by life sustaining procedures. Submissions are called for by mid-April 1983. The Victorian Bill followed numerous

similar legislative initiatives in the United States which were in turn inspired by the famous case *In re Quinlan* 70 NJ 10, 355 A. 2d 647 (1976).

Issues of life and death have always been issues for the the law. Changing technology and changing social attitudes promise more perplexing issues, including legal issues.

fire, floods and dams

'Calamities are of two kinds: misfortune to ourselves, and good fortune to others'.
Ambrose Bierce, *The Devil's Dictionary*, 1881.

ordeal by fire. The terrible Australian bushfires in February 1983 caused record losses of life and property in Victoria and South Australia. The outgoing Prime Minister, Mr Fraser, described the scene as 'this most frightful disaster'. Suggestions for both technological and legal changes have been advanced to tackle the recurring problems of Australia's bushfires. Some commentators have pointed to the virtually permanent phenomenon of bushfires in Australia, long before European man arrived. The *Canberra Times* editorial, 18 February 1983, observed:

'Before European man came here some 200 years ago, natural bushfires and bushfires lit by Aborigines would scour the land with regularity and the living creatures of the bush had adapted themselves accordingly over the years. After thousands of years of evolution, fire had a function which had become almost benign. The bush needed it. In an average Australian summer about 400,000 hectares are burnt by bushfires and regularly in all States and Territories there are bushfires more dreadful than the usual ones'.

Numerous suggestions have been made for action:

- the establishment of an Australian Bushfire Foundation to bring together diverse work already being done on bushfire control by bodies such as the CSIRO, the Natural Disasters Organisation, the Soil Conservation