held to have, thus removing the condition upon which s109 had operated.

Two Justices in the majority noted that the course of events could hardly have been conceived by Mr Metwally when he lodged his complaints. Justice Deane commented:

> The outcome of this case will inevitably appear to Mr Metwally to involve an unjust denial of his reasonable expectation that, as a visitor to this country, he might resort to, and rely upon, what Governments and Parliaments have asserted to be the law. He will derive no personal solace from the fact that, in declaring invalid the law upon which he sought to rely, this court has performed its allotted function under the Constitution ...

He added the hope that 'swift and proper compensation' would be provided to Mr Metwally by the 'appropriate authorities'. Justice Murphy echoed these feelings, expressing the view that an executive remedy might be preferable to a legislative one as it would be quicker and less likely to involve 'further lengthy constitutional litigation'. It is understood that the matter of compensation by way of executive action has not been settled. In the meantime further proceedings have been commenced in the High Court on behalf of Mr Metwally seeking a declaration that the RDA is invalid. This action would question whether the concession made in *Koowarta,* namely that the RDA implemented the Convention, was correct.

land rights. Another recent case involved the question of the effect of the RDA upon State Aboriginal land rights legislation. The Pitjantjatjara Land Rights Act 1981 (SA) (PLRA) provides for the vesting of ownership over a large area (over 10%) of South Australia in the traditional Aboriginal owners of the land, comprising members of the Pitjantjatjara, Yungkutatjara and Ngaanatjara people. Section 19 of the PLRA imposes an offence for entry onto the land by a person who is not a member of this group without the permission of Anangu Pitjantjatjaraku, the body corporate of all the members of this group established to hold the land. Mr Brown, an Aborigine but not a member of Anangu Pitjantjatjaraku, was prosecuted under this section for entering onto the land without permission. In his defence he argued, amongst other things, that s19 of the PLRA was rendered invalid by the operation of s9 of the RDA which provides that it is unlawful to do any act involving a distinction based on race or descent which has the effect of impairing the recognition or exercise, on an equal footing, of any human right, such as the right to freedom of movement. Justice Millhouse in the Supreme Court of South Australia accepted this argument.

The High Court unanimously upheld an appeal against this decision, all seven Justices delivering separate reasons for judgment. Despite some differences in opinion as to the effect of s9 and 10 of the RDA all the Justices agreed that while s19 of the PLRA was discriminatory it was nevertheless a special measure within the meaning of para4 of art1 of the Convention and was thus valid. In the course of his judgement Justice Dawson stated that in his view the question whether s9 of the RDA was a valid implementation of an obligation imposed by the Convention was still open.

Is there still some hope for Mr Metwally?

bioethics news

I can see a situation in the not too distant future where the wife of a millionaire will say 'I would like to have a child but it's too much of a hassle. Let's get that nice Mrs Jones down the road and give her $30 000 to do it-and if they make a law that says we can't, well, we'll find a nice baboon.'

Justice Austin Asche

books or babies. As the technology improves, test tube baby programs continue to produce more and more babies. At the same time, academics, law reform commissions and special committees continue to produce an ever increasing number of reports, discussion papers and articles on the ethical, economic and legal consequences of these programs. At times, it seems that the books outnumber the babies.

NSWLRC discussion paper. Latest in the series of papers is a Discussion Paper issued early this year by the New South Wales Law Reform Commission (NSWLRC) 'Artificial

Conception: Human Artificial Insemination'. The Discussion Paper is the first in a series of three in the NSWLRC's Reference on Human Reproduction, It deals solely with human artifical insemination (AID and AIH). The paper carefully canvases the issues thrown up by the practice of human artificial insemination. Its tentative recommendations include:

- Proposals to regulate the practice of artificial insemination as opposed to its performance on an individual or private basis, restricting the practice to hospitals and the medical profession;
- Continuing the prohibition of commerce in semen;
- Making provision for records to be kept and for the AID child to have access to all non-identifying information about the donor;
- Legislative provisions declaring that the AID clinic or medical practitioner should have the general power to determine the use and disposal of donated semen; and
- The creation of an advisory committee of limited membership comprising mainly medical experts, possibly with one or two members who could provide advice on the law or on government policy.

The Commission will be proceeding to public hearings on this aspect of its Reference later in April.

ethical bans. Meanwhile, at the far edges of biological engineering, the National Health and Medical Research Council has 'banned' research into surrogate embryo transfer or 'womb flushing'. The procedure of womb flushing involves fertilizing an ovum in the womb of one woman, flushing it out and transferring the resulting embryo to another woman who wants to bear a child. On the advice of the Council's Medical Research Ethics Committee, the Council decided not to fund any projects involving flushing or transferring embryos. The reasons for the ban included:

- a concern that the procedure involved using the egg donor simply as a means to an end;
- risks involved to the donor – in an unsuccessful procedure, not removing the embryo, and a continuing pregnancy, which may be ectopic;
- the difficult position of the donor father if the flushing procedure is not successful and the pregnancy continues;
- doubts about the legality of an abortion if the flushing is not successful and the pregnancy continues.

the baby as property. Proposals by Monash University to market the in vitro fertilization process through a private company have caused a great deal of controversy. Under the plan, a private company in which Monash University was to hold equity, would establish itself in the United States using the expertise of the IVF team from Monash. The National Times (Feb 1 1985) reported that Professor Peter Singer, Director of the Monash Centre of Human Bioethics, was critical of a number of aspects of the proposal. The National Times report stressed the Professor's concerns about the effect of such a proposal on academic freedom, including the freedom to publish, and the possibilities of conflict between freedom of research and the need to generate a profit. Dr Joseph Santamaria, of St Vincent's Bioethics Centre in Melbourne, was more critical of the proposal. He said (the Age, 10 December 1984) 'What the IVF people are proposing to do is set up what you might call a producer/product type of situation ... the embryo is not seen as possessing any moral status whatsoever'.

bold personality wins fine baby cotton. A similar issue has arisen in the United Kingdom. In the 'Baby Cotton' case, the English courts awarded custody of a baby born to a commercial surrogate mother to the child's natural father and his wife. The couple awarded custody were a wealthy professional couple from the United States. According to the Times Law Report, both wanted a child but in their home country adoption was slow and the child was usually aged about five years at adoption. The

couple wanted a child from birth. The father approached an agency in America. He paid the agency money and the agency undertook to find a surrogate mother to bear his child in England. (January 15, 1985)

The Sunday Times obtained a copy of contracts between natural fathers and surrogate mothers of the kind believed to have been used in the Cotton case. Under its terms:

- The mother agrees to a psychological examination, to waive the right to abortion except on medical advice, to abstain from sexual intercourse for two weeks before insemination and not to drink or smoke.
- If she miscarries, she is not paid although she is given the opportunity to participate in one further attempt at conception.
- The natural father agrees to pay the bills and accept responsibility for the child's support, provided a blood test after the birth does not exclude his paternity.
- If the baby is deformed or defective and the father refuses to accept parenthood, he agrees to pay adoption costs.

Despite the potential for a lucrative 'English-wombs-for-hire' export trade, made competitive by a raging dollar and sagging pound, the Thatcher Government was quick to bring in legislation to close down the commercial surrogacy industry. No doubt economists who had held hopes that the British Government was a thorough-going disciple of free marketeering are disappointed.

The former Chairman of the Law Reform Commission, Justice Michael Kirby meanwhile has warned that the introduction of legislation to ban commercial aspects of surrogate births is a superficial response to a major ethical and legal question. Justice Kirby made these remarks in delivering the Arthur Wilson Memorial Oration at the Australian and New Zealand Congress of Obstetrics and Gynaecology in Adelaide on 19 March. According to Justice Kirby:

> 'The large number of bioethical questions presented to the community require more than 'quick draw' legislation introduced by populist politicians. Banning commercial agencies whilst permitting private surrogate arrangements to be made satisfies no one. Proponents of surrogacy are dissatisfied and supporters point out that such a ban merely makes arrangements harder for the poor and disadvantaged. Our community should find a better way to solve difficult problems of this kind.' Justice Kirby said.

Now President of the New South Wales Court of Appeal, Justice Kirby pointed out that legislation enacted in Victoria makes it an offence to advertise surrogate arrangements and makes contracts void and unenforceable. He also referred to the legislative move in Great Britain, saying that a better way to produce legislation on topics such as surrogacy was inquiry by a law reform commission. He said that such inquiry could bring together the top experts and then submit proposals to widespread community debate.

body parts trade. A West German doctor recently ran into criticism after offering $US30000 to Third World citizens willing to donate kidneys for transplant (*The Australian*, March 2-3 1985). The doctor sent out a prospectus to doctors specialising in treating kidney patients offering to act as a middleman in finding people in the Third World willing to sell one of their kidneys. According to the doctor-entrepreneur the deal would manifestly advantage the donors, giving them virtually enough money to keep them for life. However according to West Germany's Co-ordinating Committee for Organ Transplant Centres:

> it is a monstrous idea that the rich nations should profit from the developing nations to conduct operations on their citizens which are of no benefit to their health, and in fact could put it at risk. The idea is also contrary to the fundamental principles of human organ transplant, that no money changes hands and that the donor is either dead or a close family member.

The ALRC's recommendations on organ transplants in its Report on *Human Tissue Transplants* (ALRC7) has now been implemented in all mainland Australian States and Territories. That Report took a similar approach to that

espoused by the West German Committee. In a critique of that Report in 1982, economist Professor Peter Swan now of the Australian Graduate School of Management, advocated allowing market mechanisms to regulate human tissue transplants, including both organs and blood. Professor Swan acknowledged that a market mechanism which permitted the rich to purchase organs from the relatively poor might not gain support from legislators or be generally acceptable to the Australian community. But he suggested that such a response was 'due to a sense or moral outrage' or to 'egalitarian conceptions' rather than having any sounder foundation:

> In my opinion a more soundly based response would have been to argue that the individual, whether he be rich or poor, is still the best judge of his own self-interest and that this is applicable to organs and blood donations as well as automobile parts and popcorn. The poor are not made better off by denying them the right to obtain (say) better habitation in exchange for non-essential organs or blood. If it is the poverty of the donors which is the problem it is open to the [ALRC] to recommend greater income transfers to the poor. (Published in *Law and Economics* edited by Ross Cranston and Ann Shick, Canberra 1982).

A leading British blood specialist, Dr Peter Jones claimed in the *British Medical Journal* that the international blood trade brought the AIDS epidemic to America and Europe. He claims that blood plasma brought from poor Africans in areas where the AIDS virus is endemic was sold to American firms, processed and given to people with no natural resistance to the disease. According to the report plasma has been exported from Zaire, Haiti, Belize, Columbia, Korea, Lesotho, Mexico, Panama, the Philippines, Puerto Rico, Thailand and Taiwan. (Report in *Sydney Morning Herald* , March 23 1985.)

transplant debates. In Australia, ethics have also been brought to the forefront in connection with liver and other transplant technologies. A number of people, including very young children, have recently received liver transplants with greater or lesser degrees of success. In the wake of these transplants, serious questions are being asked about the ethics and costs of these procedures. Indeed, some have found it necessary to defend the public's right to involve itself in these ethical discussions. Dr Paul Gerber, a lecturer at Queensland University, was reported in the Australian (8 January 1985) as defending the right of the public to discuss ethical issues in transplant technologies, despite the fact that the Queensland branch of the Australian Medical Association had questioned his authority to do so by pointing out his lack of formal medical qualifications:

> It is pure arrogance ... to assume that only those on medical registers are qualified to comment on these issues which have such broad implications for the rest of the community.

Meanwhile, the Australian (5 January 1985), gave some editorial consideration to the ethical problems provoked by rapid developments in medical technology over the past few years. Noting that most of the controversy had revolved around in vitro fertilization programs and biological manipulation technology, the Australian argued that 'there must be limits to medical advances'. The high price to be paid, both in terms of money and in terms of quality of life of the patient, for such extraordinary and risky surgical procedures, problems of consent, especially where children are concerned and the need to avoid any suggestion of unwarranted experimentation 'demonstrates yet again the need for a full continuing national discussion about medical ethics... The questions which touch on the nature of human life are too important to be left to the medical profession alone. The whole community should be involved in trying to work out the principles that should govern new medical procedures'.

new reference. The newly formed Victorian Law Reform Commission (VLRC) should soon be in a position to make a start on meeting this need. It has received a 'standing' reference on the new medical and scientific technology from the Victorian Attorney-General, Mr Jim Kennan. The reference calls on the Victorian Commission—

- to monitor new developments in medicine and science that raise complex ethical and moral issues or affect fundamental human rights;
- to devise procedures to ensure that appropriate legal recognition is given to medical and scientific changes; and
- to recommend legislative change where necessary.

The notion of a 'standing' reference is a new one in Australian law reform circles but it is a welcome initiative.

taps and tapes

(expletive deleted)

Watergate tapes

British moves. Telephone tapping and tapes are still in the news. Stephen Norris MP, in a column in the London *Times* (18 January 1985) has called on the British Government to cast off its 'minimalist approach' to privacy by extending proposals to regulate official 'phone tapping (due to be released in a White Paper later this year) to cover tapping by private persons and bodies:

> If and when [private] bugging is uncovered, the outraged victim finds that, apart from a possible minor breach of the Wireless Telegraphy Act, ... the offender can escape scot free.

Australian debate. In Australia, as the ALRC noted in its report on Privacy (see [1984] *Reform* 1), the position is much more secure. But even here, pressures are mounting for an extension of the right to 'tap' phones, especially in serious drug cases. The Melbourne *Age* (11 March 1985), for example, commented that:

> It seems to be an anomaly of Australia's federal system that federal police investigating drug trafficking may apply for a warrant to tap telephones but state police engaged in similar investigations may not. However, it may be argued that to safeguard against abuse, the fewer law enforcement agencies with such powers the better ...

This was certainly the view of the ALRC, which recommended strongly against extension of the right to tap phones, arguing that only the Australian Federal Police should be authorised to do it, and then, only on judicial warrant. The Age suggested that another solution would be to widen the role of the National Crimes Authority, permitting State police to approach the NCA for authority to tap 'provided the procedures are not so cumbersome as to jeopardise the security and effectiveness of the investigations concerned'.

Meanwhile the Hawke and Wran Governments' 'Loans Affair' – the *Age Tapes* – has gone into a period of revival over the question whether immunity from prosecution should be given to the NSW police who allegedly made the tapes in breach of federal interception laws. Mr Justice Stewart always favoured granting immunity to encourage the police to cooperate in authenticating the tapes. The Director of Public Prosecutions, Mr Ian Temby QC originally said 'No'. He apparently took the view that the large scale systematic and deliberate breach of privacy laws by a police force should not be condoned. Mr Temby has also stressed that even if the indemnities were granted the material on the tapes was unlikely to lead to prosecutions nor to assist in prosecutions. In an editorial in the *Sydney Morning Herald* on 22 March the case for an indemnity was forcefully put. The *Herald* argued that if Mr Bowen wanted a precedent for granting indemnity to the police 'he need look no further than that provided by the New South Wales Chief Justice, Sir Laurence Street, when he recommended that Mr Kevin Jones, a magistrate, be granted immunity so that he could be compelled to give evidence against the former Chief Stipendiary Magistrate, Mr Farquhar. Sir Laurence clearly accepted that occasionally a lesser wrong had to go unpunished so that a great wrong could be uncovered. The tapes are a similar case'.

As Reform goes to press it has been disclosed that there are more recent and relevant tapes than the Age tapes, and that they might be of evidential value. Mr Bowen and Mr Temby have reportedly agreed with Justice Stewart that any necessary indemnities should be given to enable that evidence to be used in prosecutions.