The paper concludes that there are three options open: to leave matters as they now are; to enforce the law to the full; or to change the law. The paper notes the disadvantages of leaving matters as they now stand:

- that it is bad policy to have a criminal law which is regularly flouted by men and women of good intent seeking to do their best;
- that it is undesirable that the survival of an individual severely defective but viable infant should be a matter of almost random chance depending upon the hospital, the doctor, the parents and even the season of the year;
- that if some infants are to be selected for non-treatment, society should be aware that such choices are being made and there should be public debate as to the criteria upon which the choices are based.

The paper also says that there are problems with the second alternative, namely enforcing the existing law fully. The major problems, according to a senior paediatrician quoted in the paper, are that enforcement of the law would be likely to produce more problems than it solves and also that such full enforcement would involve an infringement of the rights of the family. As to the third option, the report notes that there are a number of different ways in which it could be implemented: the specification of medical conditions under which the implementation of a decision not to treat (or even to hasten a painless death) would not constitute an offence; or a general provision empowering case-by-case decisions by the parents, doctors and hospital ethics committees.

According to the paper, if it is ultimately decided to change the law, there are a number of different ways in which such changes might be made. The law might specify the medical conditions under which the implementation of the decision not to treat (or even to hasten a painless death) would not constitute an offence, or it might make a more general provision leaving the decision in an individual instance to the treating physician with the agreement of a hospital medial ethics committee. The parents' role would also obviously need to be specified, the paper says. The paper refers to draft model legislation which has been proposed in the United States. It says that this makes it quite clear that the welfare of the child in question shall be the only decision criterion. The draft also seeks to clarify that for a child suffering from an irremediable condition there is a legal entitlement to 'the administration of whatever quantity of drugs may be required to keep such a child free of pain'. The paper notes that if it is decided either to enforce the law to the full or to change the law, then governmental action will be required and that such action should be clearly informed by human rights considerations. The Commission says that that is why it has decided to issue a discussion paper and to open up the debate as to the nature of human rights criteria which are applicable in this situation. The Commission's report on these suggestions, including recommendations as to future references which should be given to the ALRC, will be presented to the Attorney-General shortly.

In its community law reform program for the ACT the Australian Law Reform Commission has received a number of submissions suggesting that the general topic of suicide and euthanasia, of which child killing is an aspect, should be comprehensively reviewed.

media law

> The newspapers! Sir, they are the most villainous – licentious – abominable – infernal. Not that I ever read them – no I make it a rule never to look into a newspaper.
>
> Richard Sheridan (1751-1816)

frontiers of contempt law. Professor Michael Chesterman, the Commissioner in Charge of the Australian Law Reform Commission's Reference on Contempt has outlined a scheme for reforming Contempt Law so as to provide specific, well-defined safeguards against media publicity for legal proceedings. Professor Chesterman was address-

ing Longmans' Professional Seminar, *Directions in Media Law* held in Sydney recently. Professor Chesterman said: 'the intense and apparently increasing competition amongst numerous media organisations to be (or seem to be) the quickest, most efficient and most probing in dealing with news and current affairs has encouraged a number of them to test the frontiers of contempt law out of fear that if they do not do so their rivals will.'

The problem was that in difficult situations, such as the immediate aftermath of the Murphy trial, it was acutely difficult to say whether a particular publication was or was not in contempt. Both the media and the official authorities responsible for instituting contempt proceedings had to 'labour under laws which offered little more guidance than the overworked criterion: 'did the conduct in question have a real and appreciable tendency to interfere with the administration of justice?'

In this context Professor Chesterman advanced certain proposals as his ideas at this stage and not necessarily those of the Commission.

influencing jurors. He stated that there is a risk of influence of jurors by extraneous publicity. While such a risk remains, the law may legitimately impose such restrictions on free speech as are adequate, without going further, to ensure a fair trial. 'Fair trial' must be understood in the light of long-established doctrines protecting the rights of the accused at all times. The most beneficial approach for all concerned is to identify those types of publication which are clearly required to be prohibited, on the grounds of prejudice to a fair trial, to deal with these in provisions drawn as precisely as possible, and to have to resort to general phrases only when this is unavoidable.

By way of example, he suggested that the following matters relating to a jury trial should be taboo to the media unless falling within a recognised ground of defence:

- allegations as to the prior criminal record of the accused;
- allegations that the accused has been or is about to be charged with other offences to be tried separately;
- any suggestion that the accused has confessed;
- matters relating to the credibility, proclivities, associations of the accused or any witness or prospective witness.

These taboo items should be drafted as precisely as possible and be readily accessible to all people dealing with this branch of law.

substantial risk of prejudice. Professor Chesterman also made the tentative suggestion that discussion of topics of general concern which relate directly to a trial currently being held should be prohibited if the court is satisfied beyond reasonable doubt that the discussion creates a 'substantial risk of serious prejudice' to the trial.

> The media may be suggesting, for instance, that the offence for which the accused is being tried is prevalent within the community and must be stamped out at all costs. This may operate totally illogically as a message to the jury that they should enter a conviction as part of a 'campaign' against the 'pervading menace to society'.

These taboos and prohibitions should commence from the moment of issue of the warrant for arrest, or the actual arrest if no warrant proceeds it, or the issue of a summons, except for those prohibitions relating to the discussion of matters of general public interest. But, in relation to these, there should be an additional safeguard in the form of the right for the accused, or indeed, the prosecution, to apply to an appropriate court during the period prior to the trial for an order that media discussion of the issue should cease until the trial is over.

'I appreciate the suggestions of this sort are likely to be met by howls of "censorship", if not "Star Chamber tactics", from the media' said Professor Chesterman. 'But I would ask them to consider whether *ad hoc* suppression

or "gagging" orders, made in individual cases after argument on both sides, represent more of a limitation of free speech than an unvarying general prohibition covering the same types of material over the same period. The possibility of occasional suppression orders of this nature is a small price to pay for the enjoyment of a general right to conduct discussions of a public interest affecting court cases during the period between the laying of the charges and the commencement of the trial.'

fair and accurate reporting. Professor Chesterman stated that he did not envisage a 'broad public interest' defence. But he would endorse generally the defence of 'fair and accurate reporting' of judicial proceedings, so long as a report does not relate to matters disclosed in the absence of the jury.

This defence should be subject to the proviso that the reporting of actual evidence given at bail hearings (as opposed to the mere outcome) and, perhaps, at committal proceedings should be prohibited if the accused (or anyone of a number of co-accused) so requires.

other defences. Two further defences suggested by Professor Chesterman were: first, that the media organisation prosecuted for contempt did not know of the trial which its publication allegedly prejudiced and was not negligent in failing to discover that the trial was or would be taking place; and secondly, that the publication was necessary in order to protect the safety or other immediate interests of the member of the public. 'A formal defence along these lines reflects current practice' he said. The existence of a warrant for the arrest of a dangerous suspect should not inhibit the media from publishing the information that the escapee may be dangerous and from furnishing relevant details'.

Further matters raised by Professor Chesterman were:

- publicity before proceedings were instituted;
- protection of jurors after verdict;
- a suggestion that harrassment of jurors, whether by the media or anybody else, with a view to inducing them to disclose what occurred in the jury room should be an offence;
- restrictions on publicity affecting trials held by judges or magistrates without a jury;
- the publication of photographs of a suspect or accused person whether before or after arrest or the laying of charges and whether by newspaper or television;
- the reporting of interviews with witnesses or potential witnesses before a trial takes place; and
- the present procedure in contempt matters.

unsworn statements

> The truth is impossible to comprehend even when one is willing to tell it. For the truth resides in memory and the memory is clouded with repression and a desire to embellish. The recollections of any individual are conditioned by the general truths by which he or she has tried to live. To recall an event is to interpret it, so the truth is altered by the very act of remembering. Therefore, the truth, like God, does not exist – only the search for it.
>
> Frank Hardy, *Who Shot George Kirkland?*

The New South Wales Law Reform Commission recently sponsored a public meeting in Sydney to discuss the right of an accused person to make an unsworn statement, rather than give evidence on oath subject to cross-examination. The timing was appropriate. South Australia is about to join Queensland, Western Australia and the Northern Territory in abolishing the right. The Australian Law Reform Commission, in its recently tabled Interim Report No26, *Evidence,* has come out in favour of retention with restrictions on what might be said from the dock. It is interesting to note that at the meeting in Sydney there was almost unanimous support for retention.