environmental power could lead the Commonwealth to intrude upon many aspects of State responsibility and management, particularly land use. The Trade and National Economic Management Committee also recommends against giving the Commonwealth a specific power over the environment although a minority, Professor Coper and Ms Phillipa Smith, favoured the Commonwealth having a power over the conservation of natural resources. Although Professor Coper and Ms Smith thought that conservation of natural resources would fall within the concept of 'matters affecting the national economy' as used in the proposed s 51(iA), they saw value in an explicit power.

local government. The Distribution of Powers Committee and the Trade and National Economic Management Committee both considered the issue of the constitutional recognition of local government but make opposing recommendations. The majority of the Distribution of Powers Committee recommends against recognition of local government. It considers that the Constitution is a federal compact setting out the framework for the federal system of government, and the inclusion of a chapter on local government would be inappropriate. The majority says that local government is more appropriately placed in the Constitutions of the States. In addition, constitutional entrenchment of local government might oblige remote areas of Australia which do not have local government to set up a form of local government, possibly against the wishes of the persons in those areas. The Trade and National Economic Management Committee recommends in favour of constitutional recognition for local government. It argues that local government has a significant role in planning and environmental protection matters and, indeed, in many areas in the overall federal system of public administration.

agenda for reform. The Federal Attorney-General Mr Bowen has said that he hopes to introduce legislation into the 1988 Budget session of Parliament to permit proposals based on the work of the Constitutional Commission to be put to a vote in December 1988 (*Age* 21 September 1987). In an address to the Convention of the Australian Society of Labor Lawyers, he said that constitutional conventions in the 1970's and early 1980's had been 'degraded in a biannual talk fest that had more in common with a brawl on the Sydney Cricket Ground Hill than serious and objective debate of such an important issue'. He said that the Constitutional Commission, a bipartisan and apolitical group of eminent Australians, had taken the question of constitutional reform away from the political system and associated public mistrust.

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ivf development

> The more people have studied different methods of bringing up children the more they have come to the conclusion that what good mothers and fathers instinctively feel like doing for their babies is the best after all.
>
> Dr Benjamin Spock, *The Common Sense Book of Baby and Child Care*

Contrasting the trend towards legislation regulating new reproductive technologies, the NSW Law Reform Commission (NSWLRC) in its recent Discussion Paper on in vitro fertilisation (IVF) has suggested that legisla-

tion should only be introduced where absolutely necessary.

should IVF be allowed at all? The Commission explores the major objections to IVF such as those raised by the Vatican earlier this year (see [1987] *Reform* 65) and other interest groups, but points out that surveys disclose strong and continuing community approval of IVF in 'the most common situation', that is, as a treatment for infertility in marriage. The Commission also recognises that IVF research has the potential to address matters other than the alleviation of infertility; such as the alleviation or eradication of disease and abnormality at birth and the acquisition of knowledge for the relief of human suffering that may not be obtainable otherwise.

the main issue. Accepting that there is a legitimate role for IVF and embryo transfer (ET), the basic issue explored by the paper and raised for further debate is whether there is a need to make laws regulating IVF and ET and if so, what should be the nature and extent of the regulation.

the need for regulation of ivf. Although much of the procedure associated with IVF falls within what may be perceived as legitimate medical practice, it is the potential or scope of IVF as a whole which has caused concern in the community. For example, potentially, any woman can receive IVF whether or not she is infertile. This raises the possibility of commerce in human gametes or embryos which involves many issues both legal and social. For example, there is the possibility for a child, the product of IVF, to have up to 3 mothers — a mother who donated her gametes, another mother in whom the fertilised ovum was implanted and matured and thirdly, a social mother. There is also disquiet in the community regarding the parameters of IVF research - such as the use of frozen gametes or embryos and the manipulation of human embryos in experiments.

Although the Paper acknowledges the serious implications of such possibilities it points out, however, the importance of seeing IVF technology in perspective: Technology which used to be traumatic or impossible in certain circumstances has, for example, with the rapid developments in this area, now become possible. With this in mind, the Paper targets four areas of IVF technology which it considers need particular or special regulation:

- Freezing and storage of gametes and conceptuses;
- Donation to a woman of semen, an ovum or an IVF conceptus;
- Dominion or ownership of stored gametes and conceptuses; and
- Research on IVF conceptus.

ivf research. The acceptable boundaries of research on the IVF conceptus, the Commission says, is the most controversial issue. The Paper comments that

> there is reason for the opinion that resolution of the research issue will either allow the continuation of the practice of IVF or bring about its cessation.

the capacity argument. The Paper generally supports IVF research which, it says, would not have developed as quickly or to the stage it had today had extensive experimentation and research not occurred on human gametes and fertilised human ova. In this, the Paper is clearly at odds with the recommendations of the Senate Select Committee set up in 1985 to consider the

Human Embryo Experimentation Bill 1985 introduced into the House by Senator Brian Harradine (see [1986] *Reform* 186). In particular, the Paper criticises the Senate Committee's conclusion that moral status should be accorded the IVF embryo because of its capacity or potential to develop into a human person and that therefore any research that is not therapeutic, that would frustrate the embryo's capacity to become a human being, should be banned.

The Commission points out that such a prohibition would frustrate, if not outlaw, just about all research on human embryos and thereby limit our scientific knowledge in this area which had been directed to the alleviation or eradication of human infertility, to the improvement of artificial conception, to the discovery of the reasons for infertility or embryonic abnormality. The Paper rejects the Senate Committee's argument as fallacious. An embryo produced or 'created' outside the human body does not, it says, have such capacity for further development. To fulfil the capacity argument the IVF embryo would, in addition, have to be transferred into a woman's uterus and be willingly received by a woman into her body.

respect for embryos. The Paper concludes that although some measure of respect ought to be accorded to the embryo, the subject of IVF, the measure of respect should not be the same as a human person. It is suggested that the respect accorded such embryo should increase as the embryo develops.

the victorian approach. Another major issue surrounding IVF research, concerns the source of ova for research. The 'spare embryo argument' maintains that purposeful fertilisation of human ova solely for research is repugnant. However, research conducted on spare or unwanted fertilised ova under strict controls is acceptable. This principle is implicity in the Victorian Infertility (Medical Procedures) Act 1984 and proposed amendments to that Act (see [1987] *Reform* 67). Both the Senate Committee and the NSWLRC Discussion Paper maintain, however, that this distinction is untenable. The Paper concludes that neither the 'capacity' nor the 'spare embryo' argument provided persuasive reasons to restrict research on IVF embryos in the ways suggested.

a time limit on embryo research. The Paper does, however, recognise that the community would only tolerate embryo research which occurred within a certain limited time from fertilisation. It agrees with the National Health and Medical Research Council (NHMRC) that the time limit should relate to that period before which an IVF embryo could properly develop without implantation. The Commission agrees with other enquiries both in the United Kingdom and Australia that the most appropriate time limit should be 14 days. The Commission stresses, however, that any such research should only occur within reasonable constraints and strict rules should dictate accountibility, supervision and record keeping. By defining the ambit of embryo research in this way, the Paper suggests

> it may be that in the future the time limit would be extended, for example, from the time of implantation to the stage before development of sentience. Such extention would be related to community opinion and acceptance at the time (para 8.57)

nature and extent of regulation. The Paper examines the possible form

of regulation relating to IVF and ET. Ideally, it says, the approach to regulation throughout Australia should be uniform. The options for regulation considered are:

- legislation with traditional criminal punishments
- legislation that includes or permits official guidelines
- selective reliance on professional guidelines and self regulation
- financial or 'purse-string' control
- 'sunset' clauses and
- licensing.

To be effective, the Commission says, regulation should aim to secure the benefits that IVF offers to society and to restrain excess and abuse.

In evaluating the effectiveness of the suggested options, the Commission considers the approaches taken by other enquiries both overseas and in Australia and points out that world wide opinion has recognised that the public interest may not be served adequately merely by relying upon legislation as the sole means of regulation of IVF. The Commission stresses the importance of encouraging IVF research in the future, and with the rapid developments in this area, the need for a more flexible approach. The Commission therefore rejects options such as taken in the UK and Victoria which rely on traditional criminal punishment or extensive legislative regulation. In both the UK and Victorian models a licencing body regulates research and infertility services. The Commission rejects the legitimacy of such a 'watchdog', saying

> it seems inappropriate in principle that a non-expert committee standing outside the field should have a power to prevent such practices.

proposal. Rather, the Paper proposes a State advisory committee with multidisciplinary membership fulfilling the role of a 'fulcrum' between the extremes of legislative prohibition and unrestrained self-regulation. The purpose of such committee, 'should be primarily to inform the public and to assist IVF practitioners and researchers in decisions relating to the acceptability of their practices and proposals.' Such committee should not have executive powers to stop or delay research, nor to refer matters to other government instrumentalities to have research stopped.

functions of the committee. The committee would report to the Premier, report to Parliament and release statements to the media. Another function of the proposed committee would be to undertake public and private enquiries, to require the supply of information and to publish information of public importance. The Paper insists that to so confine the role of the proposed committee would not be to create a body with insubstantial powers — a conclusion it says is demonstrated by the effectiveness of the ombudsman and the privacy committee which rely on similar powers.

self regulation. In particular, the Commission is mindful that extensive restraints and controls already exist nationwide regulating IVF practice and research through the code of specific principles or guidelines promulgated by the NHMRC and the network of ethics committees which the council requires to exist in every institution undertaking IVF practice or research. According to the Paper this code has been cited with approval by professional and government bodies both within Australia and overseas.

Briefly, the NHMRC principles include the following:

- each IVF and ET clinic should have all aspects of their program approved by an institutional committee and registers recording data relating to all IVF attempts should be kept by the clinic;
- IVF research is permissible but not beyond the stage at which implantation usually takes place;
- sperm and ova should be regarded as belonging to the donors, and their wishes regarding disposal of their gametes should be respected as far as possible; and
- only early 'undifferentiated' embryos should be stored and time limits imposed on the duration of storage.

No legal functions attend a clinic's failure to comply with the NHMRC guidelines, however, non compliance may lead to cancellation of the clinic's eligibility for federal government research grants. A breach of ethics may, the Paper points out, expose the medical practitioner to disciplinary proceedings which may result in sanctions from reprimands and fines to suspensions from practice.

The Commission is enthusiastic about the NHMRC system which has the advantages of providing guidance within a flexible system responsive to change without the disadvantages of more formal legislative regulations.

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human rights commission bares its teeth

> Never allow the thoughtless to declare
> That we have no tradition here!
>
> Mary Gilmore, *The Ringer*

The Human Rights and Equal Opportunity Commission (HREOC) gave a clear indication that it intends to exercise its new powers when it heard a case in Tasmania alleging discrimination by a publican in refusing to serve a drink to an Aboriginal person.

The incident. Anthony Maynard entered Mahoney's Hobart Hotel between 8.00 and 8.30pm on Saturday 2 June 1984 with three other men. All were Aborigines. They were joining a group of approximately 20 other persons for a celebratory dinner. One of the men was wearing a football jumper of a local Aboriginal team and the others were neatly dressed in casual clothes. Maynard was refused a drink on at least three occasions because, he was told, his dress was unacceptable. Maynard lodged a complaint with the then Human Rights Commission on the ground that being refused a drink constituted unlawful discrimination on the grounds of race in breach of section 13 of the Racial Discrimination Act 1975 (Cth).

The findings of h r e o c. Justice Einfeld, President of HREOC, who heard the complaint in Hobart in June 1987, did not accept that Maynard's personal dress played any part in the refusal of service. In Justice Einfeld's view there was no credible evidence that personal dress alone was sufficient to warrant refusal of a drink. He commented