

- How should the law regulate IVF? Should IVF be prohibited or need it be regulated at all?
- Should restrictions be placed on the availability of IVF services or should all women of childbearing age be regarded as eligible?
- What should the law say about the posthumous use of stored gametes (sperm and ova) and stored embryos in the IVF procedure? What should the law say about the birth certificates and inheritance rights of a posthumously conceived IVF child?
- What should the law say about dominion over stored gametes and stored embryos?
- Should research on the human ovum fertilised *in vitro* be prohibited? If not, should it be legally regulated and how? Should there be a time limit on permissible research? Should the fertilisation of ova *in vitro* for the purpose of research be permissible?
- Should counselling be made compulsory for the parties to IVF? Should the law impose requirements for consent to be given by the parties to IVF?
- Should an advisory (consultative) committee be established as part of a system of regulation of IVF? What should be the powers and functions of such a committee?

The inquiry into IVF is the second of three projects in the NSWLRC's major reference called Artificial Conception. The other two projects are:

- human artificial insemination
- surrogate motherhood.

The first project, Human Artificial Insemination has now been completed. A report on this subject was presented to the Attorney-General in June 1986.

In May 1987 the NSWLRC published a research report on Australian public opinion on surrogate motherhood. A discussion paper on surrogate motherhood is to be released soon.

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family law

All happy families resemble one another, each unhappy family is unhappy in its own way

Leo Tolstoy, *Anna Karenina*, I Ch 1

changes in family law. A series of important changes affecting the jurisdiction of the Family Court in regard to children, the enforcement of maintenance obligations and the operation of family law are incorporated in the Family Law Amendment Act 1987, the Child Support Act 1988 and in the Family Court of Australia (Additional Jurisdiction and Exercise of Powers) Act 1988.

children: uniform laws and jurisdiction. The Family Law Amendment Act implements the powers referred to the Commonwealth by four States in regard to the guardianship, custody, access and maintenance of ex-nuptial children. This long-awaited reform was recommended by the Australian Constitutional Convention in 1976 and was endorsed by the Joint Select Committee in 1980. Two States, Queensland and Western Australia, have not yet referred powers.

Under the Act a uniform law will apply in the States concerned, to all

children, whether nuptial or ex-nuptial. The Family Court can now deal with many children who were previously excluded from its jurisdiction. The provisions of the Family Law Act relating to children have been substantially re-enacted with modifications. The distinction between children of a marriage and other children is virtually removed in those States which have referred powers. There will no longer be frustrating delays caused by disputes as to which Court has jurisdiction or who can bring an application. Under the Act any person who has an interest in the welfare of the child may institute proceedings.

maintenance. The Family Law Amendment Act also implements the first stage of the Child Support Scheme. It has a counterpart in the Child Support Act 1988 which sets up the Child Support Agency. The liability of a person to maintain that person's spouse and children has been strengthened and new machinery is being set up to ensure the effective enforcement of the liability.

The duty of a parent to maintain a child is accorded priority over all commitments other than commitments necessary to enable that parent to support himself (herself) or another person whom that parent has a duty to maintain. The liability of a parent to maintain each child of that parent has the same priority, no matter what the status of the child.

In assessing maintenance, the Court will have to consider the actual needs of the child, having regard to the age of the child, the expected education and training of the child and any special needs of the child. The Court may have regard to the findings of public research in relation to the maintenance of chil-

dren. These provisions endorse decisions of the Family Court and reflect the importance of the Report of the Institute of Family Studies and the Family Law Council on the *Cost of Children in Australia*.

The amendments are designed to ensure that the actual cost of caring for the child is taken into account and that the burden is shared equitably between the parents. The receipt by a child or a parent of a social security pension or benefit must be disregarded.

Other provisions give the Court power to vary child maintenance orders and agreements even where there is no change in circumstances where it can be shown that they are not proper or adequate.

The spouse maintenance provisions have also been strengthened. Consent maintenance orders can now be varied where the order is not proper or adequate even if there is no change in circumstances. Even approved maintenance agreements which have been approved by the Court and which are normally regarded as final can now be varied if at the time of approval the party in question could not have supported himself or herself without an income tested pension allowance or benefit. More liberal provisions will apply to spouses seeking an extension of time to apply for maintenance after the present cut-off period twelve months after decree nisi.

Other provisions enable agreements dealing with custody, guardianship, welfare or access to be registered in the Court; registration makes an agreement enforceable and precludes either party from asking the Court to make an order in respect of the same matters; there is power to vary or set aside in certain circumstances.

child support agency. One of the most serious defects in the maintenance law has been the difficulty in securing enforcement. It has been reported that 70% or more maintenance orders are not complied with. The result of this is that many children in one-parent families receive inadequate support. A significant aspect of the latest reforms is that a mechanism has now been provided to ensure the effective enforcement of maintenance. The Child Support Act was passed on 23 February 1988 and is to commence on a date to be proclaimed. The Act establishes a Child Support Agency as a division of the Tax Office. Its function is to collect maintenance liable to be paid under a Court order or agreement made after the specified date.

If the person entitled to maintenance under a Court order or registered agreement is receiving or claims a means tested pension allowance or benefit the maintenance order or agreement has to be registered in the Child Support Register. There are exceptions in the case of lump sums or payments made less frequently than monthly.

Other orders may be, but need not be registered at the election of the payee. Provision can be made for orders and agreements made before the commencement of the Act to be registered.

The normal method of payment is 'automatic withholding'. The employer is required, by notification, to deduct the amount due and remit it to the Child Support Registrar. There is a minimum 'protected earnings amount', depending on financial responsibilities.

An interesting aspect of this legislation is the provision for appeals from

decisions of the Child Support Registrar. Decisions refusing to register or vary particulars can be objected to. Thereafter an appeal lies to a Court having jurisdiction under the Act, including the Family Court. Decisions of the Registrar refusing to remit or credit an amount and certain other decisions relating to the recovery of maintenance can be reviewed by the Administrative Appeals Tribunal.

courts of summary jurisdiction. The Family Court of Australia (Additional Jurisdiction and Exercise of Powers) Act 1988 has given courts of summary jurisdiction extended powers to deal with property and divorce under the Family Law Act. In property matters the present limit on jurisdiction of courts of summary jurisdiction is \$1 000. Unless the parties agree the Court cannot exercise jurisdiction where more than that amount is in dispute. This 'compulsory' limit has now been raised to \$20 000. Earlier drafts of the Bill had incorporated by reference the limit applying to courts of summary jurisdiction in respect of recovery of debts. These limits are different in each State. A Senate amendment substituted a limit of \$10 000 or \$20 000 where a motor vehicle is involved. In the Act as passed, the \$20 000 limit applies without regard to any mortgage, lien, charge or other security over the property.

These provisions may cause some concern about the preservation of a uniform approach to the practice, procedure and principles of matrimonial property law, particularly at a time when the Australian Law Reform Commission's Report: *Matrimonial Property* (ALRC 39) has made recommendations for significant changes in the field. Structured procedures for

conciliation and case management are not generally available in courts of summary jurisdiction.

Divorce applications will also be able to be dealt with by prescribed courts of summary jurisdiction under the amendments. It is not yet clear whether applications can be filed directly in magistrates courts or whether they will be transferred from the Family Court after receipt of the filing fee.

changes to the family court. The Family Court of Australia (Additional Jurisdiction and Exercise of Powers) Act 1988 has also made sweeping changes to the jurisdiction and structure of the Family Court of Australia:

- The Family Court of Australia will be able to exercise jurisdiction in matters transferred by the Federal Court. These include matters arising under the Administrative Decisions (Judicial Review) Act 1987, the Bankruptcy Act 1966, Section 189 of the Income Tax Assessment Act 1936 (appeals from assessments) and Division 1 or 1A of Part V of the Trade Practices Act 1974 (consumer protection).
- The prohibition on robing in the Court, Section 97(4), has been removed.
- The office of Deputy Chief Judge and Judge Administrator have been created.
- The office of Judicial Registrar has been created and the Court is empowered to delegate any of its powers to Judicial Registrars other than the power to make an order in relation to the custody, guardianship or welfare of or access to, a child (except in interim proceedings or by consent).

- Registrars will be able to exercise additional powers of the Court.

The original concept was that the Family Court should have a less formal atmosphere, and that judges and counsel should not be robed or bewigged. The Parliamentary Joint Select Committee on the Family Law Act reported in 1980 that the changes were 'largely welcomed by the public' and supported the policy of creating a less formal atmosphere. Senator Durack moved the amendment in the Senate to remove the prohibition on robing. The result will be to remove another of the features which distinguished the Family Court from the traditional legal system.

more to come. The new Chief Judge, the Hon Justice Alistair Nicholson, has foreshadowed even further changes. The restrictions on identifying parties to proceedings in media reports are being examined. At present the Court is open and proceedings can be reported in full as long as parties are not identified; this was the recommendation of the 1980 Joint Select Committee and was implemented in 1983. From a recent editorial in the *Sydney Morning Herald*, it appears that the press are not interested in reporting proceedings in the Court unless they can name the parties. This is seen as necessary to enable the press to perform its role of informing the public about the operation of the Court and to overcome 'myths and misconceptions and highly damaging speculation'. (*SMH* 10 February 1988, leader).

Meanwhile, the Chief Justice, Sir Anthony Mason, has called for the Family Court to be treated and equipped to operate properly as a mainstream superior Court to ensure public confidence. 'There is no

more important or difficult area of the law than family law' (the *Age*, 21 March 1988). At the same time Sir Anthony cast doubt on the moves to confer jurisdiction on the Family Court in bankruptcy, taxation, consumer protection, trade practices and administrative review work. If the proposal did not result in Family Court judges undertaking a significant proportion of important work it would do little for the status and reputation of the Court, though it may prove relief from an exclusive diet of family law.

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update on the review of commonwealth criminal law

The Review of Commonwealth Criminal Law was established with the aim, amongst other things, of consolidating and rationalising the criminal laws of the Commonwealth and bringing into being one consolidated law. The review is being conducted by Sir Harry Gibbs, former Chief Justice of the High Court, Mr Justice Watson and Mr Andrew Menzies. The first two Discussion Papers produced by the Review Committee, DP1: *Onus of proof in Criminal Proceedings and Averment Provisions* and DP 2: *Common Law Offences and the Commonwealth*, were discussed in the October 1987 issue of *Reform* ([1987] *Reform* 205). The output of the Review Committee since then has been prolific and at the time of writing another 8 DPs had been produced. The space is not available to discuss the Review Committee's proposals in the depth which they deserve, however, what follows seeks to draw to the reader's attention at least the subject matter and main themes of the Review Committee's recent work.

dp 3: arrest and related matters. DP 3 deals primarily with arrest without warrant. The main proposals involve an extension of police powers in this area while also giving some additional rights to those arrested. The Review Committee is of the view that the numerous powers in Commonwealth legislation for police to arrest without warrant should, with limited exceptions, be repealed and replaced with one comprehensive provision. The provision tentatively proposed would be broader than the current s 8A of the Crimes Act. It is suggested that the power should extend to cases where it is reasonably suspected (or believed) that the person to be arrested has committed, is committing, has attempted to commit or is attempting to commit an offence, but probably not to situations where it is reasonably suspected or believed that a person is about to commit an offence.

In addition it was argued that the issue of whether a person arrested for an offence against Commonwealth law may be detained for questioning should not be left to State laws which vary significantly. Following some recent State reforms it was proposed that the consolidating law should specify a time for which an arrested person may be held for questioning before being brought before a justice and that there should be provision for extension of that time in proper cases.

To balance giving police new powers to question on arrest it is proposed that any person arrested should have the opportunity to communicate with a legal adviser and should, with some exceptions, have the right to have such an adviser present during the police questioning. The arrested person should also have an opportunity to communicate with a parent, spouse, other rela-