

(26 June 1980) acknowledged the brilliance of the medical techniques and the raised hopes of infertile parents. But it pointed to other issues:

- the extent to which man is entitled to interfere with or depart from natural reproductive processes
- the present huge costs of test tube babies as an allocation of resources
- the implications for further experimentation e.g. the production of humans by other selective and unnatural means and the 'spectre of human cloning'

The solution posed by the editor was a thorough inquiry:

The issues posed by the birth of Candice are so profound and complex that they call for a dialogue [between researchers and society] and for moderation in the further application of this research until the public has had a chance to catch up with and sort out the issues. The very fact that the birth has caught the Federal and State Governments unawares ... of itself offers a strong argument for a pause.

**Artificial Insemination.** The legal issues of artificial insemination have been referred by the Standing Committee of Attorneys-General to the NSW Attorney-General, whose officers are preparing a report. It is envisaged that this will propose uniform legislation throughout Australia on the legal consequences of AIH. As announced, it is understood that the scheme will be limited to cases where the donor is the husband of the woman recipient. The fact remains that artificial insemination (for default of children for adoption) is now a large and growing medical industry. Cases involving donors external to the marriage are very numerous. The legal problems arising include:

- obligations to inform marriage partners
- entitlements to identification of donors
- obligations to keep medical records to trace genetic diseases
- passing of property
- removal of disadvantages of illegitimacy
- rights of donors, including non-husbands

In the Council of Europe, a committee of experts has drafted a recommendation 'On

Artificial Insemination of Human Beings'. This has been adopted by the European Committee on Legal Co-operation and a number of basic rules laid down for adoption in the member countries. It is to be hoped that Australian laws dealing with this subject will be comprehensive and, like the ALRC proposals on human tissue transplants (now gaining widespread acceptance) debated thoroughly in the public forum. This is not a subject for lawyers only. Nor, let it be said, is it a subject only for the medical profession.

Addressing these dilemmas, the Governor-General, Sir Zelman Cowen, told a Graduation Class at the Joint Services Staff College in Canberra on 19 June, in the context of scientific developments generally:

[I]t is surely the case ... that if nothing is done to adjust the legal system to these scientific developments, things will not just remain the same. Inconveniences and perceived injustices will occur because old rules of law become irrelevant or positively obstructive or because situations have arisen affecting members of society, upon which current laws are perfectly silent. I may add that pressures within particular sections of society may well build up a formidable head of steam and responses dictated by the generation of urgent pressures do not assure orderly development or resolution.

## odds and ends

■ The doyen of law reform and first Chairman of the English Law Commission, Lord Scarman, visited Australia in September 1980. During the course of his visit, on 12 September, he called on the ALRC. Collected to meet him were Commissioners of the NSWLRC, Tas LRC and ALRC. Also present was Mr. Terence Purcell of the N.S.W. Law Foundation and leading representatives of administrative law reform in Australia. Mr. Justice Brennan (the first Chairman of the Administrative Review Council, and a past ALRC Commissioner) joined Mr. Justice Davies (President of the AAT), the Commonwealth Ombudsman (Professor J. Richardson) and the current Chairman of the ARC (Mr. Ernest Tucker) in

outlining to Lord Scarman the administrative law reforms introduced into the Commonwealth's administration. Lord Scarman has always had a keen interest in administrative law reform. Obviously, he enjoyed the vigorous exchange with Australian reformers.

■ No word yet on progress concerning uniform defamation laws in Australia. Meanwhile, at the Press Club, Hobart, in mid July 1980, the Chairman of the Tasmanian LRC, Mr. Bruce Piggott, spoke on the subject 'What's Wrong With the Law and the Press?' He recounted the problems faced by the press because of the law of contempt. He dealt both with the Thalidomide case and the recent litigation involving Granada Television and the British Steel Corporation. On the question of journalists' privilege he suggested that a facility should be available for 'pre-clearance' of publication by an independent and prestigious person or committee. His concern about some of the implications of the *Granada* case is reflected both in Britain and closer to home. The *New Law Journal* (1980) 130 NLJ 226 has described recent decisions in England, even before Granada, as a 'threat to investigative journalism'. The *West Australian* (10 June 1980), whilst denouncing 'trial by newspaper' as something 'Australia can well do without' urges a different rule in relation to civil matters, striking a better balance between protection of individuals and 'the public's right to information'. It suggests that we too should be looking at foreshadowed British reform of contempt law.

■ One of the key suggestions in the ALRC Report *Unfair Publication*, on defamation reform was a statutory provision for a 'right of reply'. This issue has become a live one in England. The English Press Council has adjudicated that a newspaper, even one which publishes facts later found to be wrong, has a right to refuse publication of a retraction. The journal defended its action on the grounds that it had acted reasonably in publishing in the first place. More recently, *The New Statesman* (28 August 1980) 4, reports that the Campaign for Press Freedom is urging the adoption in Britain of a legal right of reply:

The principle is a difficult one to fault: individuals and groups who have been the victims of serious distortion in a newspaper or magazine should have the right to present their case to readers, with a reasonable amount of space and prominence.

But it is pointed out that this proposal is 'bound to draw the fire of editors who fear any encroachment on their autonomy'.

■ The Minister for Foreign Affairs, Mr. Andrew Peacock, and Attorney-General Durack announced on 5 August 1980 that Australia would at last be proceeding to ratify the International Covenant on Civil and Political Rights. The ratification represents the culmination of 14 years of work pursued by successive Australian Governments. Symbolically, the announcement was made at a ceremony which was attended by former Prime Minister Whitlam, whose Government first signed the Covenant. The negotiations with State Governments, which have substantial constitutional rights in respect of the subject matters of the Covenant, were led by Mr. Peter Bailey, Special Adviser on Human Rights. As a result of an *impasse* between the House of Representatives and the Senate concerning the proposed Human Rights Commission, the Commission has been shelved for the time being. Instead, a Bureau has been established in the Attorney-General's Department. Its objects will be not dissimilar to those of the intended Commission. It will:

- investigate alleged breaches in human rights referred to it by the Attorney-General
- promote community awareness and discussion
- establish links with non-government organisations
- co-operate with State authorities

A number of reservations are attached to Australia's ratification. These related to prison conditions, anti-discrimination and State responsibilities in the Australian Federal constitutional context. (1980) 5 *Cwlth Record* 1163. The actual instrument of ratification was lodged at the U.N. in New York on 13 August 1980.

■ An interesting proposal relevant to civil

rights was announced by Senator Colin Mason, Deputy Leader of the Australian Democrats in Federal Parliament. Just before Parliament rose for the Federal Election he introduced a Bill to permit citizen initiatives, upon petition, to require a referendum on a law which, if accepted by the people, would bypass Parliament. The Democrats' Bill had not been read a second time when *Reform* went to press. More will be heard on this subject in the forthcoming federal elections in Australia.

■ Concern about court delays and the implications of legal aid, which were mentioned by Sir Garfield Barwick at Lagos (see p. 109) have been reflected in judicial comments within Australia. Chairman of the Commonwealth Legal Aid Commission, Mr. Justice Else-Mitchell, has cautioned against abuse of legal aid by legal practitioners. Mr. Justice Rogers in the NSW Supreme Court stressed that the Commercial List was available to the mercantile community but that it entailed a corollary obligation on legal advisers and clients to so prepare the case as to ensure an early opportunity to have the dispute decided. In much the same vein, Mr. Justice Samuels of the NSW Court of Appeal addressed the American Bar Association Extension Meeting in Sydney in August on the solution to the efficient processing of cases before the courts. He referred to US statistics on judicial caseloads and declared that they were, by Australian standards, 'staggering'. One suggestion to help Australia cope with growing court dockets was the establishment of administrative machinery to deal more cheaply and expeditiously with motor car cases.

The inefficiencies of personal injury torts litigation was a theme also taken up by Professor Harold Luntz (Melbourne Law School) in a paper for the Labor Lawyers' Conference. Professor Luntz had a more radical solution still. Australia's compensation laws should be swept away and replaced by the Woodhouse system of universal national no-fault compensation:

The present system eats up about 50% of the premiums in administration and investigation costs. ... In New Zealand they can administer their (universal) scheme for a cost of 10% of gross revenue.

*The Sydney Morning Herald* reported Professor Luntz and declared, referring to the Woodhouse-Meaures report on national compensation in Australia:

Just before the Whitlam Government was dismissed, it foreshadowed more realistic proposals. It is time to dust them off and build on them. The present compensation schemes are random in their coverage, often providing inadequate compensation and too often give rise to serious injustices. It should not be beyond the wit of Australia to devise something better at reasonable cost.

■ The NSW Legal Services Commission recommended in mid June a greatly expanded system of legal aid for children. It proposed that local committees should be established to offer a 24-hour advisory service. It also proposed that social workers should be engaged and rosters established to ensure that children arrested by police could always have prompt advice and support. The Commission proposed a pilot scheme to be carried out in Bathurst, N.S.W. The issue of legal representations for 'children in trouble' is also under study in the ALRC. Its forthcoming report, *Child Welfare*, is now being finalised. In particular, draft legislation is being prepared, envisaging the comprehensive change in A.C.T. child welfare laws and procedures.

■ Former ALRC Commissioner, Mr. Murray Wilcox Q.C., has now returned to his busy practice at the NSW Bar. Although unsuccessful in persuading the High Court of Australia, at a stroke, to reform the law of 'standing' upon which he had laboured as an ALRC Commissioner (see *Australian Conservation Foundation v. The Commonwealth* (1980) 28 ALR 257), he continues to advance the conservation cause, now as President of the Australian Conservation Foundation. In a recent ABC 'Guest of Honour' broadcast on 'Conservation in the Eighties' Mr. Wilcox declared a general view that the direction for the 1980s will include 'efforts towards better human relationships, a more frugal use of resources, the creation of jobs which are capable of yielding human satisfaction and a closer contact with nature': all of which represent a search for 'a caring and conserving society'.

Opening the Australian Conservation Foundation Conference in Melbourne on 30 June 1980, another past Commissioner, Sir Zelman Cowen, declared that these directions were such that 'all should have sympathy' with them.

■ The ALRC report on *Lands Acquisition and Compensation* (ALRC 14) tabled in Federal Parliament in April 1980, has received bouquets from the editor of the Australian Law Journal. Writing in (1980) 54 ALJ 306, the report is described as proposing 'some radical changes'. It is commended for making 'a valuable contribution to the literature on the law of eminent domain' quite apart from the practical reform aspects to which the Commission has paid attention. The collection of data on Commonwealth acquisitions is praised and the editor concluded:

This is one of the best Reports issued to date by the Commission. It merits the serious attention of the Government and of Parliament and is distinguished by the meticulously due regard that has been paid to the terms of reference by the Attorney-General and as well to the spirit of those terms.

The fate of the report is not yet known. It is somewhere under consideration in the Canberra machinery. Perhaps the administrators will heed the comments of Australia's most prestigious law journal.

■ Reform of family law is very much in the news. The long-awaited recommendations of the Parliamentary Committee Inquiry into the Family Law Act urge that a new set of rules should be drawn up governing the division of property between couples on the dissolution of marriage. The committee recommends that the ALRC should be invited to examine ways of developing new matrimonial property rules. Specific attention is given to the division of superannuation policies which now sometimes unfairly exclude provision for a former wife. The chairman of the committee, Mr. Philip Ruddock M.P. (Lib. N.S.W.) said that other aspects of the report included:

- greater emphasis on conciliation functions in the courts
- child maintenance awards to have

reference to statistical estimates of the costs of keeping a child

- more counselling for parents
- repeal of provisions giving priority to the wishes of children 14 years and over
- provision for affidavit evidence to cut costs and trauma of court cases
- opening of Family Court proceedings to the media, without the disclosure of names

Attorney-General Durack is reported to have responded generally favourably to the report.

■ Meanwhile, in South Australia, Justice Kemer Murray of the Family Court told the annual meeting of the Royal Australian College of General Practitioners that if something more were not done to ease the problems of children in broken marriages 'we will become a nation of neurotics'. Since its establishment, the Family Court has dissolved more than 200,000 marriages, though recent figures suggest a fall-off in applications. Speaking to an international conference at Queenstown, New Zealand in July 1980, Mr. Justice R.S. Watson described in detail the parliamentary vision of the Family Court and instanced ways in which this had been frustrated by the adversary trial system and lawyers clinging to established techniques which were costly to parties both in pocket and emotional terms. To the same conference, the New Zealand Attorney-General, Mr McLay, had a word of caution for reform enthusiasts:

While law reform is important, lawmakers and lawyers generally should not overestimate their capacity to influence the conduct of human affairs. We should, I think, be particularly sceptical when the particular branch of law touches the dynamics of personal relationships, as family law does.

■ The ALRC interim report, *Sentencing of Federal Offenders*, (ALRC 15) continues to create controversy and debate. In an address on the launching of a book, 'Corrections in Asia and the Pacific' Attorney-General Durack, at the Institute of Criminology, said:

Without prejudging the Commission's proposals, I can say that, if there is to be action in [the area of more uniform treatment of federal offenders in State prisons throughout Australia] it would, in my view, be best done pursuant to co-operative

arrangements between Commonwealth and States. The Commonwealth would wish to avoid taking any initiatives for uniformity in this area which could have the effect of creating apparent anomalies in State courts or apparent discrepancies in the treatment of detainees in State prisons.

The Attorney-General declared that the increase in non-custodial sentencing options was 'the most significant development' in the reduction of imprisonment. He said that one could not doubt the need for adequate crime statistics, the absence of which is trenchantly criticised in the ALRC report. Senator Durack also announced that he hoped that the States and the Commonwealth could enact relevant legislation soon to permit exchanges of prisoners, so that persons convicted in other jurisdictions could be transferred to prisons closer to their homes. On the subject of criminal statistics, the Commissioner of the Australian Federal Police, Sir Colin Woods, earlier had some characteristically blunt things to say. He declared that many magistrates in Australia were forced to work 'in the dark' in imposing sentences in criminal cases. Not only were they not provided with any systematic information by which they could check their sentence. They also received no feedback on the people they had sent for punishment. In the recent Judicial Survey conducted by the ALRC with the N.S.W. Law Foundation, 74% of judicial officers answered that they either favoured or strongly favoured the compilation of detailed statistical data on sentencing as a means of promoting uniformity. Of the remaining 26%, the majority was either neutral or unsure rather than opposed to the idea.

## new reports

### Australia

- ALRC : 16 : *Insurance Agents & Brokers* (1980). See p.100.  
 NSWLRC : *Annual Report 1979*  
 SALRC : 50: *Regarding Data Protection, 1980*  
     : 53: *Relating to the projected Securities Industrial Bill, 1980, of the Commonwealth Parliament, 1979*  
     : 54: *Relating to the topics of Property, Trusts, Uses, Equity & Wills, 1980*

- : 55: *Relating to the Inherited Imperial statute Law on Practice & Procedure in this State, 1980*  
 WALRC : WP II: *Liability for stock straying on to the highway, 1980*

### Canada

- Canada LRC : WP 27: *The Jury in Criminal Trials, 1980*  
 British Columbia LRC : 44: *Report on Parol Evidence Rule, 1979*  
     : WP 28: *The Making & Revocation of Wills, 1980*  
 Manitoba LRC : 40: *The Enforcement of Judgements: Part II: Exemptions under 'The Judgements Act', 2980*  
 Ontario LRC : *Thirteenth Annual Report, 1979*  
 Saskatchewan LRC : *Tentative Proposals for a Definition of Death Act, 1980*  
     : *Tentative Proposals for an Occupiers' Liability Act, 1980*  
     : *Tentative Proposals for Custody Law Reform. Part II: Procedures & Support Services, 1980.*  
*Uniform Law Conference of Canada : Proceeding of the Sixty-first Annual Meeting, 1979.*

### United Kingdom

- Law Com: WP 75: *Classification of Limitation in Private International Law, 1980*  
     : WP 76: *Time Restrictions on Presentation of Divorce & Nullity Petitions, 1980*  
     : DP: *Divorce in the Early Years of Marriage, 1980*  
 Scottish Law Com : 58: *Education (Scot.) Bill: Report on the Consolidation of Certain Enactments Relating to Education in Scotland, 1980*  
     : Memo 44: *The Law of Incest in Scotland, 1980*  
     : Memo 45: *Time-Limits in Actions for Personal Injuries, 1980*  
 Eng LRC : 22: *Twenty Second Report: The Making & Revocation of Wills, 1980 (Cmnd 7902)*  
 Police Complaints Board : *Triennial Review Report, 1980*  
 Justice : *Breaking the Rules: the Problem of Crimes & Controversions, 1980*  
     : *The Local Ombudsman: a Review of the First Five Years, 1980*

## what's going on in the LRCs?

### Australian Law Reform Commission (ALRC)

- *Insurance Contracts*. First stage, report tabled dealing with insurance intermediaries. Second stage, work in hand. (WIH). See p.100
- *Sentencing*. Interim report now available from printer. Report being widely distributed and debated. Public hearings contemplated in 1981. See p. 128.
- *Lands Acquisition and Compensation*. Report under consideration in Federal administration. Discussed in ALJ. See p. 128.