## Bio-ethics and the Law

> "The nation's morals are like its teeth; the more decayed they are the more it hurts to touch them."
>
> George Bernard Shaw, c. 1920.

Amazing advances in medical and surgical techniques promote new problems for law and morality. That is the message contained in the A.L.R.C. Report, *Human Tissue Transplants* (A.L.R.C.7). The Report, setting out a new code to ensure proper and just conduct of transplantation surgery, has now been taken a step further in the Australian Capital Territory, with the passage of the *Transplantation and Anatomy Ordinance*, 1978. In the report, the A.L.R.C. Commissioners called attention to the likely "considerable future expansion in human tissue transplants". They also drew attention to the need for consideration of other subjects within the Australian community in the near future. The subjects identified were

- euthanasia;
- genetic engineering;
- human experimentation;
- embryo transplants and artificial insemination.

Because these were considered discrete subjects, they were not dealt with in the A.L.R.C. Report. The last few months has seen attention given to some of these subjects.

In September 1978 the Victorian Law Reform Commissioner, Sir John Minogue Q.C., addressed some of the new problems in Working Paper No. 5, *Duress, Coercion and Necessity* (1978). A tentative recommendation of the Working Paper includes the proposal that there should be a general defence of necessity, i.e., a defence to a crime to show that its commission was necessary in order to avoid a greater evil to the defendant or to others. Various limits are proposed as a safeguard and attention is drawn to the "highly controversial area of euthanasia". The V.L.R.C. points out that the problems go beyond even this controversy:

> "Other ethical problems . . . can easily arise in cases of offences against the person. For example, what would be the situation if an immediate blood transfusion is essential to save an injured person and the only one who has the same blood type refuses to give blood? Can he be overpowered and the blood taken from him . . . ?"

The possible application of the doctrine to rare blood groups and to the taking of bone marrows and organs for transplant is also referred to. Whilst recognising the strong and long-standing resistance to a defence of necessity "based upon a fear of opening the door to an increase in lawlessness", the V.L.R.C. comes down in favour of a general defence of necessity based both on justification and excuse:

> "To leave the decision as to the exculpatory effects of necessity, to the executive or administrative agencies where generally no public scrutiny is possible, seems wrong and seemingly could be capricious."

Some of the problems posed by new developments in medicine are discussed by Lord Justice Ormrod in "A Lawyer Looks at Medical Ethics" published in (1978) 46 *Medico Legal Journal* 18. A little-known fact is that Sir Roger Ormrod is a qualified medical practitioner and a Fellow of the Royal College of Physicians. In his Paper, delivered as an address to the Royal Society of Medicine, Sir Roger dealt with a number of sensitive issues, including:

- abortion;
- brain death;
- consent in the case of young patients;
- clinical trials on a sample of the community.

One specific development identified in the paper is the implicit acceptance, in recent years, that there is a "cost benefit" equation which cannot be completely ignored in medical treatment. The medical profession has

> ". . . recognised that it is concerned with something more than the maintenance of life in the sense of cellular chemistry, and so implicitly accepted the concept of 'quality of life' from which it has in the past always fought shy, for obvious reasons. It also has implicitly accepted that considerations of cost-benefit cannot be completely ignored. . . . Ten or fifteen years ago, mere mention of either was enough to precipitate an emotional response from most doctors. Now they are explicit and can be discussed and debated rationally—an important advance from many points of view."

Sir Roger reserves praise for the pragmatic way in which the Supreme Court of the United States dealt with the abortion question and cites with apparent approval the opinion that although a doctor's primary duty is to do his best for his patient and although this normally means saving life, there can be cases where

saving or prolonging life "is not necessarily the best for all patients and may be actively harmful".

"Medical ethics," it is declared, "is a tangled skein made up of many different strands" including the legal, moral and professional rules. It is admitted that the moral strand determines the private limits within which the doctor, as an individual, makes his decisions. In some cases this can come into conflict with the law.

> "This has happened occasionally in the past in relation to abortion and, if the law were to lag too far behind opinion and social attitudes, it could happen again."

Meanwhile, in the Australian Parliament on 16 August 1978 Senator Peter Baume drew attention to the confused legal status of children born following the process of artificial insemination by donor. He asked whether the Government believed that the matter might usefully be referred to the Australian Law Reform Commission.

The Attorney-General, Senator Durack, agreed that considerable legal problems were raised by A.I.D. He pointed out that the question had been discussed by the Standing Committee of Commonwealth and State Attorneys-General at a meeting in February 1978.

> "Also, the possibility of its being referred to the Law Reform Commission is being considered and I expect at an early date to give consideration to it with officers of my Department."

Although the questions of bio-ethics are highly controversial and intensely sensitive in a democracy, the fact remains that medical science goes on while the law stands still. Artificial insemination is occurring. Some genetic engineering and experimentation is occurring. The first "test tube baby" has now been born. New tasks await law reformers who can assist Parliament towards laying down the ground rules suitable for the problems of today's society. If nothing is done, the law will be silent and give no guidance to doctors and scientists. Old laws, designed for other circumstances, may, then, have a haphazard and unexpected application to new circumstances made possible by scientific and technological developments.

## More on F.O.I.

> "The only sure bulwark of continuing liberty is a government strong enough to protect the interests of the people and a people strong enough and well enough informed to maintain its sovereign control over its government."
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> F. D. Roosevelt,
> *Fireside Chat,* April 1938.

The debate about the *Freedom of Information Bill* introduced into the Australian Parliament by Federal Attorney-General, Senator Durack Q.C., continues. The Senate Standing Committee on Constitutional and Legal Affairs has called for public submissions on the Bill. So far most of the debate has been directed at the scope of the exemptions from the obligation to disclose government information and the effectiveness of the machinery provided to ensure, in practice, individual access to such information. The *Sydney Morning Herald*, whilst welcoming the reference of the Bill to the Senate Committee, described the present draft as "a disappointment". It delivers a special shaft at the exemption from disclosure of an "internal working document" describing this as, "a bastion of unnecessary secrecy".

Meanwhile a major blow for access to government information came in the course of a decision of the High Court of Australia handed down on 9 November 1978. The decision in *Sankey* v. *Whitlam and Ors.* arose out of proceedings for an alleged conspiracy brought against the former Prime Minister and members of his then Cabinet. The conspiracy alleged included that of deceiving the then Governor-General, Sir John Kerr, in respect of overseas borrowing arrangements. Access was sought to certain Cabinet documents. This was refused.

Amongst many others dealt with in the Reasons for Judgment of the Court (comprising Gibbs A.C.J., Stephen, Mason, Jacobs and Aitken JJ.) the scope of Crown Privilege in respect of the production of Executive Council and Cabinet documents was considered.

In the case, no suggestion was made that the contents of any particular document sought were such that their disclosure would specifically harm the national interest. The claim made was that the documents should be withheld from disclosure, not because of their individual content, but because of "the class