

told Parliament that no case could be made for 'scrapping' the present Constitution. Though there were areas of the Constitution needing review and though the 'resurgence of interest' in the possibilities of constitutional reform were to be welcomed:

we have to frame our thinking on the basis that the Constitution will regulate the affairs of our country into the 21st century.

Senator Durack welcomed the initiative of the Law Foundation in establishing the project aimed at a serious national debate on the need for constitutional change. He pointed out that a sub-committee of the Australian Constitutional Convention was still studying draft proposals for constitutional reform. Whether Mr. Purcell, Senator Evans and their team can encourage a genuine national debate on the shape of the Constitution remains to be seen. Certainly, the world of Australia in the 1980s is very different to the world of the 1890s when the present instrument was framed. Sir Zelman Cowen, speaking to the conference in Canberra in September 1981, is reported to have repeated what had been said to him by a distinguished Australian judge not long ago — that if Australia were seeking to federate for the first time today, it might have difficulty in getting there (*Canberra Times*, 3 September 1981). Nevertheless, support for the broadly-based re-examination of the Constitution has come from a number of quarters. One of them, the prestigious *Melbourne Age* (22 August 1981), urged an open-minded approach to the project:

It has mustered broad support. Politicians from all parties, business and union leaders, lawyers and academics, have combined [in order] to produce a report on constitutional reform. Their report will then be the subject of public discussion at a series of seminars to be attended by 'key opinion and community leaders' in each capital city. ... It is a heavy agenda, even for an all-star cast. ... That reform is necessary and desirable is beyond question. The events of 1975 proved, if nothing else, the danger of acquiescent reliance on the principles and unwritten conventions of an outmoded Constitution. Less obviously, the Constitution creates havoc in the administration of many branches of the law; it makes for unholy strain between the tiers of government. And it is inflexible: something close to unanimity is required before the rules could be changed. We

heartily encourage the Law Foundation in its new project. Whether the Foundation plans to tackle the Constitution gradually, through amendment, or whether it favours a root-and-branch renewal has yet to emerge. The important thing, now, is that the talks cease and the tackling begins.

## medico/legal corner

It should be the function of medicine to have people die young as late as possible

Dr. Ernst L. Wynder.

*life comes first.* During August 1981, the United Kingdom press carried banner headlines about a case posing legal problems typical of many now presented by modern medicine. In the case of *Re B.* (a minor) the Court of Appeal (Lords Justices Templeman and Dunn) on 7 August 1981 handed down a decision authorising a surgical operation to save the life of a profoundly retarded child. They allowed an appeal by a London Council from an Order of Mr. Justice Ewbank made earlier in the day, upholding the right of the child's parents to refuse consent for the operation. The child was little more than a week old. She was suffering from Down's syndrome. She also had an intestinal blockage which would be fatal unless it was operated on. The parents took the view that it would be unkind to the child to operate and that she should be sedated and allowed to die. It was agreed by all parties that the parents had come to their decision 'with great sorrow, believing that it was in the best interests of the child'. Lord Justice Templeman posed the issue:

Was it in the best interests of the child that she should be allowed to die, or that the operation should be performed? That was the question for the court. Was the child's life going to be so demonstrably awful that it should be condemned to die; or was the kind of life so imponderable that it would be wrong to condemn her to die? It was wrong that the child's life should be terminated because in addition to being a mongol she had another disability. The judge erred because he was influenced by the views of the parents, instead of deciding what was in the best interests of the child.

*Times Law Report*, 8 August 1981, 14.

The decision provoked a week of front-page feature articles in the British press, arguing for and against the Court of Appeal decision. The editorial in *The Times* (10 August 1981) had few doubts.

The Court of Appeal decision was certainly the right one in the circumstances. Down's syndrome, sad as it is, is not an affliction that leads inevitably to a miserable life. Many sufferers are cheerful and affectionate, and only moderately disabled. As with spina bifida, it is difficult at present to predict at birth how badly disabled the patient will be. Certainty of prediction always clarifies the ethical issues, and it is one of the most important ways in which medicine can help to relieve the dilemma in the future. The attitude of the parents, though clearly important as a clue to the baby's prospects of affection in life, cannot be a decisive factor against treatment (though perhaps a steady resolve to cherish a child in spite of all handicaps should be decisive in encouraging doctors to do their utmost). In fact it must almost inevitably be right for the court to come down on the side of life whenever there is a division of opinion amongst those directly concerned, so strong that the issue is brought before it.

**doctors' dictatorship.** The head of a hospital paediatric department, however, expressed the view that the Appeal Court was 'very very wrong'. It was against the interests of the parents, the child and society. In a statement to the *Times* (13 August 1981) Professor John Lorber said that those who praised the decision of the Court of Appeal to save the Down's syndrome baby against the wishes of the parents were 'grossly hypocritical' because more than 300 spina bifida babies a year are allowed to die without public protest. The professor urged that criteria for deciding which babies should be treated and which allowed to die should be drawn up, so that survival did not depend so greatly upon the attitude of individual doctors.

It was the importance of getting away from the dictatorship of individual medical practitioners that was a recurring theme in the 1980 BBC Reith Lectures of Dr. Ian Kennedy, Reader in English Law at King's College, London. In an interview to the *Listener* (30 October 1980) Dr. Kennedy stated his theme:

We as individuals seem to have been content in the past to leave it to doctors. ... I don't think that's fair to doctors because it's a decision of great philosophical import, about how we think we ought to treat people — not treat in the medical sense, but behave towards them; how we value life, how we value suffering.

The London *Times*, whilst acknowledging the unfair moral burden presently placed on the medical profession, explored the alternatives:

The courts are too laborious, and too cautious of trespassing on rival professional mysteries, to be usefully involved in any regular way. The development of medical skill is continuous, so that cases where the prospects of a rewarding life seem hopeless now may well seem worth active treatment in a few years' time. This restricts the scope for cut and dried rules. ... Dr. Kennedy was right to assert that medical ethics is a branch of everybody's ethics. Where there is a serious doubt about general principles it must be hammered out openly, by public debate and if necessary in the courts, or in legislation.

**test tube law.** A similar theme is taken up by the Chairman of the ALRC in a piece written in the *Medical Journal of Australia*. Referring to the major in vitro fertilisation programme developed at the Queen Victoria Hospital in Melbourne, he referred to the dilemmas posed, including what should be done with fertilised human ova, surplus to use. The hospital's ethics committee had decided to freeze and store them rather than destroy them or use them for experiments.

Society must face the dilemmas of artificial insemination and in vitro fertilisation. If ever there was an issue upon which there is a need for a profound and thoughtful community debate, this is it. Where issues of life and death are involved, we must seek out an informed community consensus. It is not a matter for doctors, scientists or lawyers alone.

See also (1981) 55 *ALJ* 314.

To similar effect was a report of the Family Law Reform sub-committee to the Law Institute of Victoria. Writing in the *Institute Journal*, Mr. Christopher Wray urged a new legal regime to deal with children born by artificial insemination by a donor (AID).

*hare and tortoise.* It seems that some progress is being made in these matters. In August 1981 the Standing Committee of Attorneys-General, meeting in Cairns, announced that children conceived by artificial insemination would be given the same legal status as natural children of a marriage. The planned legislation is to overcome discrimination against AID children in areas of inheritance and family maintenance. Donor fathers are to have no legal relationship with the child, unless married to the child's mother. The Queensland Attorney-General, Mr. Doumany, explained that the Ministers had taken the view that an AID child of a married woman should be considered the 'legal issue' of the woman and her husband, provided the latter had consented to the insemination. Under the proposed law, it would not be necessary to register the birth of an AID child as an 'ex nuptial birth'.

Commenting on the announcement, the *Melbourne Age* (10 August 1981) declared:

Like the hare and the tortoise, science and the law run a permanently unequal race. While science moves in dazzling leaps and pirouettes, weaving wonder and miracles, the law plods sedately behind and collects the dust. It is sometimes a very long plod. ... It is a belated but welcome recognition that the law as it stands discriminates cruelly, if unintentionally, against [AID] children. ... Yet it is only part of the solution; there are more clouds of dust stirring on the horizon. The ethics of AID and in vitro fertilisation for example. Because there is little legal control over the selection and screening of donors, there remains the possibility of genetically transmittable diseases and of marriages between half siblings. These were not matters considered by the Attorneys-General. They were not, perhaps, the right people to do so.

The *West Australian* (4 August 1981) gave a hint of the dilemmas remaining:

The changes proposed will not sweep aside all the moral and philosophical reservations felt in some sections of the community towards AID births. And there is a special difficulty with regard to the moves in Australia towards establishing the right of an adopted person to seek his or her natural parents. But since AID is now an established fact of life, bringing happiness to many childless couples, the

law must acknowledge what is happening and keep pace with it. Federal and State Governments should work towards early implementation of what the Attorneys-General propose.

The NSW Attorney-General, Mr. Frank Walker QC, indicated that he would act urgently to get Cabinet approval for the Bill to give AID and test tube babies legal equality with natural children. He also announced that a committee of the Attorneys-General had made 'substantial progress' towards resolving legal problems involving the Commonwealth's powers over ex nuptial children.

*brain death.* Meanwhile, in the United States, a United States Presidential Commission has proposed a simple uniform law defining death in terms of the end of all brain functions. In terms almost identical to those proposed by the ALRC in its report *Human Tissue Transplants* (ALRC 7), the definition proposed by the President's Commission for the Study of Ethical Problems in Medicine and Bio-Medical and Behavioural Research is expressed thus:

An individual who has sustained either  
(1) irreversible cessation of circulatory and respiratory functions, or  
(2) irreversible cessation of all functions of the entire brain, including the brain stem, is dead. Determination of death must be made in accordance with accepted medical standards.

In Australia, the Australian Law Reform Commission was used as the vehicle to address the problem of brain death and the development of the rules governing transplantation of organs and tissues. The report of the Commission has been followed by legislation in a number of Australian jurisdictions and is under consideration in others. It was widely praised in medical and legal circles and was produced under the leadership of Mr. Russell Scott, now a Sydney barrister. The report shows that progress can be made even on difficult and controversial medico-legal questions. LRCs can provide the vehicle for harnessing the appropriate medical, theological, legal and ethical experts and focusing the community debate.

Another development worth noting in the United States is the approval by a Senate Subcommittee by a narrow vote of a Bill declaring that human life begins at conception and that a foetus is entitled to all the legal rights of a human being. The Bill, titled 'Human Life Bill', is backed by anti-abortion forces and is designed to negate decisions of the United States Supreme Court permitting abortions in the first six months of pregnancy. It will now go to the Senate amidst cries by opponents that it will make all abortions, and even some contraceptive measures, acts of murder. Certainly, if a similar law were adopted in Australia, it would provide further dilemmas for the doctors engaged in the test tube fertilisation programme.

***treatment of children.*** One vexed issue which has now been referred to the Law Reform Commission of Western Australia relates to the provision of medical services to young people. On 5 July 1981, the State Attorney-General, Mr. Ian Medcalfe QC, announced terms of reference to the WALRC for the development of a uniform law on this subject:

For some time the Standing Committee of Attorneys-General has been concerned at the uncoordinated aspects of the law relating to the provision of medical services for minors. I suggested that [this subject] could be examined by our State law reform commission with a view to receiving recommendations which could form the basis of enacting uniform legislation throughout Australia. The committee agreed to my suggestion and the terms of reference have been settled. This demonstrates the high regard in which our law reform commission is held in other parts of Australia.

The terms of reference given to the WALRC require particular attention to such matters as:

- provision of contraceptive and psychiatric services;
- provision to other persons by minors of body organs and tissues;
- special needs relating to drug, tobacco and alcohol dependence and sexually transmitted diseases;
- claims of minors for privacy and confidentiality.

Mr. Medcalf declared that the terms of reference, which covered many other controversial topics, provided 'a large canvas, embracing many topics'. He predicted that it would be 'some time' before the study was completed. Certainly, if the ALRC projects which overlap the new WALRC inquiry are any guide, the terms of reference are replete with issues that will stir public passions.

The ALRC itself divided on the issue of donations by minors to other family members for organ transplantation. Laws based on the ALRC report have also divided on this issue. Sir Zelman Cowen and Mr. Justice Brennan dissented from the majority view that in limited circumstances minors ought to be permitted, with judicial approval, to donate to close family members.

The issue of children's privacy stirred passions as no other topic of the privacy inquiry did. A note on this subject is found in [1981] *Reform* 22.

Mr. Philip Clarke, Executive Officer and Director of Research of the WALRC, has indicated that the Commission plans to release a working paper towards the end of 1982. Already the Commission has written to health departments and agencies throughout Australia seeking submissions and assistance. The case is an interesting experiment in uniform law reform. The medico-legal area provides plenty of work for uniform law reform. The adoption in a number of jurisdictions of the ALRC report on Human Tissue Transplants indicates that this is an area of operations in which LRCs can play a useful role in helping the democratic lawmaking process to face up to hard and sensitive problems. Certainly, the problems are coming thick and fast. And new means are needed to assist the tortoise of the law in its race with the energetic hare of science and technology.

## privacy concerns

Without information, life is no more than the shadow of death

Molière, *The Would-Be Gentleman*, 1670.