THE COMMONWEALTH SECRETARIAT

8TH COMMONWEALTH LAW CONFERENCE

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The Hon. Justice M.D. Kirby, CMG*
Australia

IN THE REAR AND LIMPING

In Mount Isa Mines Limited v Pusey[1] Windeyer, J of the High Court of Australia wrote of "[l]aw, marching with medicine but in the rear and limping a little ...".[2] This remark, addressed to the stumbling approach of the law to the provision of damages for nervous shock occasioned by negligence may be too kind when applied to the response of family law to the remarkable advances of knowledge and technology affecting human sexuality and conception.

Nowadays, there is a growing sense of urgency and impatience about the response of the law to medical developments. One writer, trained both in law and medicine observed from an informed stand point:

> "Those doctors who have studied law have always been uneasy at the extent to which Anglo-Saxon law departs from reality in dealing with biological issues. The nervous shock cases which continue to be based on medical principles discarded during the 19th century provide a notorious example. The irreconciliable differences between the legal concept of criminal responsibility and

> the actual behaviour of offenders who suffer from mental disorder, the bizarre principles by which conviction and punishment are meted out to those accused of what is considered to be irregular sexual behaviour, are fully appreciated only by those doctors who choose to appear as expert witnesses, or who come into contact with the accused persons."[3]

To these cases for anxiety and impatience must now be added the impact of the developments concerning human sexuality, procreation and conception as affecting family law. The family is declared by numerous international human rights statements to be the natural unit for the organisation of human society.[4] Although in many countries changes have occurred in conceptions of marriage and the family - many of them consequent upon advances in the status of women, the sexual revolution, developments in contraception and other economic and social changes - the forces which promote the living together of men and women remain basically the same. They include the achievement of sexual satisfaction, the procreation of children and congenial companionship. The law has changed in many jurisdictions to reflect changes which have occurred in attitudes to marriage, the family and the children of such relationships. For example, there have been important changes in the family law of many Commonwealth countries, responding originally to a report of the English Law Commission[5] which proposed the replacement of matrimonial fault as a ground for dissolution of marriage by the consensual principle addressed to the irreconciliable breakdown of the relationship.[6] In some

countries, however, and in many States of the United States of America it is still necessary to prove a matrimonial offence. Under that regime, adultery remains one of the principal grounds of divorce. Other typical changes in family law have been the adoption of new laws on illegitimate or ex nuptial children[7] and, more recently, new laws on de facto relationships.[8]

In this paper no more can be done than to refer to a small number of remarkable developments which have occurred in recent years in the science of human biology and in the technologies that have grown from that science. It is proposed to deal first with the position of the adult partners and secondly with the position of children. Inevitably the treatment must be brief and necessarily superficial.

THE ADULT PARTNERS

Classical literature refers to the appearance of persons with hermaphrodite features. But it is only in recent years that the developments of surgery and advances in techniques of transplantation and treatment of immune rejection has permitted medical intervention to help determine by surgery an ambiguous sexual identification. Such cases normally do not come before the courts. But in increasing numbers, courts, in a number of Commonwealth jurisdictions, have lately been called upon to examine the consequences, including for family law of such "sex change" operations.

Probably the most celebrated case is that involving April Ashley.[9] She was born with male genitals, gonads and a male chromosome pattern. She then underwent a sex change operation

in which the scrotum and penis were removed and a vagina constructed. Thereafter she lived exclusively as a woman. She met and married a Mr. Corbett. The relationship broke down. It fell to Ormrod, J to determine whether the marriage had initially been valid. In his judgment, Ormrod, J said:[10]

> "Since marriage is essentially a relationship between man and woman, the validity of the marriage in this case depends ... upon whether the respondent is or is not a woman. ... Having regard to the essentially hetero-sexual character of the relationship which is called marriage, the criterion must, in my judgment, be biological, ... In other words, the law should adopt in the first place, the first three of the doctors' criteria, ie chromosomal, gonadal and genital tests, and if all three are congruent, determine the sex for the purpose of the marriage accordingly, and ignore any operative intervention."

Ormrod, J proceeded to conclude that April Ashley was not a woman and so could not marry a man. He acknowledged that real difficulties could occur in a case where, unlike that case, the three criteria to which he referred were not congruent. He expressed a view, unnecessary for the decision, that "greater weight would probably be given to the genital criteria than to the other two".

The case of added difficulty foreshadowed by Ormrod, J arose in proceedings in the Family Court of Australia in Brisbane in 1979. A wife sought a declaration that her marriage to "D" was null and void on the ground that the husband she had

married in 1967 was neither man nor woman but a combination of both. When he was 21, "D" had been diagnosed as a true hermaphrodite. His chromosomal pattern was female. But he possessed both male and female gonads (1 ovary and 1 testis), a short penis, a tiny uterus, a rudimentary vagina and well formed breasts. He had been reared as a male.

Surgical intervention had removed the breasts of "D" and the ovary. It had reconstructed the penis into one of normal size and shape. The medical procedures involved were sufficiently notable to be documented in a paper published in the Medical Journal of Australia.[11] The medical writers concluded, with understandable pride:

> "[T]here is now nothing in the patient's appearance to distinguish him in any way from a normal adult male. He shows no personality disorder of any kind, and is quite secure in his maleness."[12]

Soon after the completion of the medical procedures, "D" became engaged to his future "wife". They went out together for some five years before getting married. No sexual intercourse took place between them during that time, nor, indeed, at any other time.

Bell, J granted the "wife's" petition. He gave two reasons.[13] The first was that the wife had been mistaken about the identity of the person she had married. In the result, her consent was not a "real consent".[14] She had believed that she was marrying a male person. In fact she was marrying a person who was both male and female. The second reason given was based on the decision in Corbett. "D" was to all intents and purposes a male in two of the three criteria which Ormrod, J had

identified. However, his chromosomal character remained female. In these circumstances, being neither man nor woman, he could not enter a valid marriage.

This decision of the Australian Family Court has been criticised by a number of commentators. Dr. Henry Finlay has described the first ground advanced by Bell, J as erroneous.[15] Rebecca Bailey has criticised the second ground offered as evidencing a misunderstanding of the principle in Corbett and resulting in an unacceptable outcome. She points out that the respondent in Corbett would at least have been able to marry in the future but whereas the respondent "D" could marry no-one. This, she contends adds unacceptably to the psychological and social difficulties already facing transexuals in their attempts to lead a normal life:

> "The medical profession in particular may feel with justification that its efforts in this complex area have been frustrated by the law."[16]

Sir Ronald Wilson, one of the Justices of the High Court of Australia has also offered extra curial comments on the decision:

> "His Honour may have thought he was applying the principle laid down in Corbett but the important distinction lay in the fact that the three criteria based on chromosomal, gonadal and genital tests were not congruent as they were in Corbett. The only help to be gleaned from the earlier case was the tentative suggestion of Ormrod, J that where the criteria were not congruent greater weight might be given to the genital

criterion than to the other two. Even then, it seems, his Lordship would have confined himself to the biological considerations at the time of birth."[17]

The principle in Corbett was applied by the English Court of Appeal in R v Tan & Ors.[18] In that case it was held that a person born a male remained biologically a male, even though he had undergone a sex change operation. Nonetheless, he was held capable of being convicted under s 30 of the Sexual Offences Act 1956 namely of being "a man" who lived on the earnings of prostitution. An application to the House of Lords for leave to appeal was refused.[19] To adapt Bailey's comments, it would seem that the law is not inclined to keep pace with the changes of sexual identification, now capable of surgical reinforcement.

In the United States attempts have been made to secure legal protection for transexuals under the United States Constitution and under the Civil Rights Act of 1964. But the United States Courts have likewise not proved encouraging.[20] In Australia, a special committee established by the Standing Committee of Attorneys-General has for some time been examining the legal position of transexuals with a view to uniform State legislation. The possible need for Federal legislation in Australia to deal with cases of medical intervention under the marriage and divorce powers may result from reflection upon the unsatisfactory features of the common law as illustrated in Corbett and C v D. Tests which address chromosomal patterns at birth may have been appropriate even in 1970 when Corbett was decided. But as the sophistication of "sex change" operations and transplantation techniques improve and as social attitudes

to transexuals change, it may well be more appropriate (and certainly more benign) to have regard to physical and psychological considerations at the time of marriage or after surgical, hormonal and psychological intervention.

As if in proof of this contention, a 1984 case in Toronto, Canada shows what may now be achieved. A 43 member surgical team in Toronto operated to separate two year old Siamese twins. When born, Win and Lin Htut were joined at the pelvis. They were both genetically male and shared male genitalia, liver, intestinal and urinary tracts and some bones. They only had two normal legs between them and a third, deformed leg. During the surgery, the pelvis was divided. Lin was left with the male genital organs. Skin and muscle from the third leg was used to create an artificial vagina for Win. Her male gonads were removed. The doctors were confident that, with hormone treatment and acceptance of her femininity by others, Win would grow up as a girl. Each child will later receive an artificial leg. Yet if the tests pronounced in Corbett and C v D were applied by the Canadian courts, Win would be condemned by the law to the prospect of a life without [a valid] marriage as an additional burden to the physical disabilities which nature has inflicted but which medical technology and resourceful medical practitioners have struggled to overcome. I suspect that few would quarrel with Sir Ronald Wilson's conclusion:

> "[T]he decision [in Corbett] signals the need for a greater flexibility in the law to enable it to come to grips with current reality freed from bondage to

> displaced historical circumstances. The decision in the case of C and D was perhaps even worse in its consequences. It effectively relegated D to the "no-man's land" of non-sex, thereby denying him any opportunity of marrying, whether as man or woman. Again, the operation of the criminal law in the case of R v Tan reminds us of the disparate application of that law to the sexes in relation to sexual offences and the problems that occur when a person who in reality has become a woman is nevertheless regarded as a man in the eyes of the law and is committed to prison as such."[21]

Legislation to provide a more modern approach to the predicament of transexuals, including in family law, has been enacted in Sweden and in several States of the United States of America.[22] It is clear that Commonwealth countries will have to address this problem with an urgency that reflects changing social attitudes, the advances in medical techniques and the capacity of surgical intervention to achieve success. Attention should be paid to the suggestion, in much recent literature that psycho-social intervention may in many cases be more suitable than surgery in the treatment of transsexuals.[23]

THE CHILDREN

Abnormal conception: For millennia, the normal method of securing human conception has been by sexual intercourse between man and woman. The man and the woman might or might not be married. It was to the consequences of the conception, rather than the mode of its attainment that that area of the law now called family law was typically addressed. It is only in recent years that medical technology has refined conception by artificial insemination. Still more recent are the developments of in vitro fertilisation and surrogate births.[24]

Most recent of all is the procedure called "gamete intra-fallopian transfer".[25] It may be useful to describe briefly each of these new techniques. It is important to recognise that in each of them the overwhelming problem being addressed is infertility, ie the inability of the couple to secure conception by intercourse. There are occasional reported cases of homosexual partners who resort to the procedures to avoid normal intercourse.[26] But the significant problem is overwhelmingly one of persons in a normal heterosexual relationship (most of them married) who discover that the relationship is involuntarily infertile. Although there are no accurate figures on the extent of infertility, it is widely stated that some 10 to 15% of marriages fall into this class.[27] The oldest techniques, in use for several decades in mainstream medical practice, to overcome infertility are artificial insemination by husband (AIH) and artificial insemination by donor (AID). There is relatively little opposition to AIH, although some religions cannot countenance it because of the separation of the "unitive" and procreative aspects of sexual intercourse.[28] Much more controversial is AID. It is said that some 2,000 to 4,000 births a year are produced by this procedure in the United Kingdom alone.[29] AID is typically adopted where the husband's semen is definitely inadequate in quantity or quality. The couple are counselled. The anonymous donor becomes the genetic father of the child even though the partner (husband) will become its social father, in the sense of providing security and affection to the child so produced. The identity of the genetic father is typically withheld. It

seems that in the United Kingdom and Australia medical students are often used as volunteers. Other fertile men may also be used as donors, raising the question whether they should have the informed consent of their wives.[30] To avoid the risk of incestuous union between AID children, it has been suggested that administrative controls should limit the number of inseminations from the same donor. Figures ranging from 5 to 20 are mentioned.[31]

The report of the British Committee of Inquiry into Human Fertilisation and Embryology (the Warnock Committee) in 1984 recommended legislative changes in England designed to incorporate the child born by AID procedures into the family and to equate such a child to a child of the marriage. The Committee unanimously recommended that the AID child should in law be treated as the legitimate child of its mother and her husband where they have both consented to the treatment.[32] It recommended a change in the law to clarify the fact that the semen donor would have no parental rights or duties in relation to the child. But it also recommended that on reaching the age of 18, the child should have access to the basic information about the donor's ethnic origin and genetic health and that legislation should be enacted to provide the right of access to this data.[33] To assure the consent of both parties, it recommended that a formal consent in writing by both partners should always be obtained before AID treatment began. Following the English Law Commission, the Warnock Committee concluded that it should be presumed that the husband had consented to AID unless the contrary was proved. The law should be changed to permit the husband to be registered as the father. The

philosophy behind these recommendations is clear. So long as there was informed consent by the parties to a marriage, the child of AID procedures should be assimilated to, and treated as if it had been genetically (as it is socially), a child of the marriage.

In vitro fertilisation (IVF) attacks a different problem. A small proportion of infertile women can produce healthy eggs. Although they have a normal uterus, these women have damaged or diseased fallopian tubes which prevent the egg passing from the ovary to the uterus and hence prevent conception. Surgery can help some cases. As to the others, they represent an estimated 5% of infertile couples. As described by the Warnock Report the concept of IVF is simple:

> "A ripe human egg is extracted from the ovary, shortly before it would have been released naturally. Next, the egg is mixed with the semen of the husband or partner, so that fertilisation can occur. The fertilised egg, once it has started to divide, is then transferred back to the mother's uterus. In practice the technique for recovery of the eggs, their culture outside the mother's body, and the transfer of the developing embryo to the uterus has to be carried out under very carefully controlled conditions. ... It was not particularly difficult to fertilise the human egg in vitro. The real difficulty related to the implantation of the embryo in the uterus after transfer. A pregnancy achieved in this way must not only survive the normal hazards of implantation of in vivo conception, but also the additional problems of IVF and embryo transfer."[34]

Once conception is envisaged extra utero, it is possible to think in terms of securing conception with varying relationships to the married couple, depending upon the source or sources of the infertility of their relationship. Thus, for reasons of economy and the avoidance of discomfit and risk, the practice has developed of recovering several eggs from women undergoing IVF treatment. Egg donation has been attempted in the United States of America and in Australia, there having been one recorded live birth at least in Australia. Some women may produce no eggs but be otherwise capable of carrying to full term an embryo secured from a donated egg (perhaps of a sister or another woman undergoing IVF treatment), conception being secured by the introduction of the husband's semen. Developments in the capacity to thaw the human egg (presently experimental) will increase the availability of this technique. The Warnock Committee recommended that egg donation should be accepted, subject to controls.[35]

An alternative technique, necessary in some cases is the donation of an embryo. One of the sources of concern about this and other procedures associated with the IVF technique derives from the belief that human life begins at the moment of conception. Upon this view, destruction of the human embryo or their preservation in a frozen state is unacceptable as an unnatural interference in the right to life of that embryo. Nature is more wasteful in the production of the germ cells than almost any other tissues.[36] Five months before birth the human female has all the eggs she will ever have - about 7 million. By the time of birth, one or two million eggs remain.

The attrition of gametes is even more spectacular among men. If a man with an average sperm count ejaculates, say, 6,000 times in his life time, he will produce no fewer than 1,000 million potential fertilisers of an egg. Of these spermatazoa only an infinitisimal fraction is likely to find successful expression by fertilising an egg that will ultimately become another individual.[37]

Surrogacy arrangements become more feasible and attractive to infertile couples once it is possible to achieve conception extra utero and without the emotional complications that attend normal conception. To date, only theorists have raised the possible use of surrogacy or "womb leasing" as a means of relieving the busy professional woman of the burden and professional interruption of carrying a child, whilst assuring her the birth of a child genetically related to her and her partner (husband). But some of the opponents of the very notion of surrogacy express concern that that is where condoning the procedure will lead. Revulsion at the notion of surrogacy has led a number of reports, in various countries of the Commonwealth, to urge diverse legal and administration interventions designed to discourage or even prohibit the practice.

Thus, the Warnock Committee recommended that English legislation be enacted to render all surrogacy agreements illegal and the contracts unenforceable in the courts.[38] The Committee on the Social, Ethical and Legal Issues arising from in vitro Fertilisation in Victoria, Australia (the Waller Committee) has recommended that payments for surrogate mothers

should be banned and that surrogacy contracts should be legally unenforceable.[39] A Committee of the Family Law Council of Australia chaired by Justice Austin Asche has also recommended that surrogacy arrangements should be prohibited.[40] A news release of Mr. L.K. Bowen, Federal Attorney-General, quoted the Chairman of the Family Law Council of Australia, Justice Fogarty (a judge of the Family Court of Australia):

> ""The reproductive technology with which the Report [of the Asche Committee] is concerned is not just a medical procedure - and it is therefore essential that the matter be monitored by a national body which is representative of all of the interests vitally involved in these matters and not confined to interests which are solely and largely medical, as is the present situation." Mr. Justice Fogarty said the welfare and interests of the child should be the paramount consideration in control of AID, IVF, embryo transfer and related procedures, and the issues arising from them." We are not convinced that this is presently the case," he said."[41]

Other recommendations in the Asche Committee Report include that the use of known donors of gametes who are related to the recipient couple be not permitted, that counselling be an important and integral part of all infertility and reproductive technology programs, that information identifying a person's geneological origins be available to adults over 18 years; that non-identifying information be available prior to the child's reaching 18 and that commercial exploitation of reproductive technology be investigated.[42]

Finally, the procedure known as gamete intra fallopian transfer is carried out where a patient has healthy fallopian tubes. The eggs and sperm are inseminated in the fallopian tube under laparoscopic control.[43] This is not a case of laboratory extra utero insemination. Pregnancy rates are reported (where the technique is available) at in excess of 30%, ie about twice as high as the average success rate of current IVF insemination in Australia.[44]

Legal developments: In default of comprehensive legislation, cases are already beginning to come before the Courts. The most notable, involving surrogacy, concerned the so called Baby Cotton.

The case was decided by Latey, J in January, 1985.[39] An American couple had approached an agency in the United States to find a surrogate mother to bear the husband's child. It seems that the wife was infertile. But she consented to the procedure and the arrangement. The father came to England in 1984 for the sole purpose of providing seminal fluid for insemination of the surrogate mother. Conception resulted. The husband and wife travelled to England upon the birth of the child in January 1985. However, the matter caught the attention of the media. Wardship proceedings were commenced in the High Court. In the result, Latey, J granted care and control of the baby to the husband and wife (described as Mr and Mrs A) and gave leave for the baby to be taken out of the jurisdiction to be brought up in the United States, although the child remained a ward of the English Court. The judge stressed that the method used to produce the child and the commercial aspects involved

raised delicate problems of ethics, morality and social desirability. However, these were not of his concern. The baby having been born, the guiding principle was its best interests.

Such was the public outcry that the United Kingdom Government introduced the Surrogacy Arrangements Bill 1985, advancing treatment of this aspect of the Warnock Committee's recommendations. The Act provides prohibition of the recruitment of women as surrogate mothers and the negotiations of surrogacy arrangements by agencies acting on a commercial basis. It also prohibits advertising of surrogacy arrangements throughout the United Kingdom.[45] Legislation to make it an offence to publish any advertisements or notices likely to induce a person to become a surrogate mother has also been enacted in the Australian State of Victoria.[46] However, this legislation has lately been criticised by the Australian pioneers in IVF on the basis that it has frustrated their research by delaying decisions upon research on embryos from frozen eggs.[47] The legislation is also open to the criticism that it attacks surrogacy in a half hearted way by addressing itself to the commercial aspects only whilst not actually forbidding voluntary non commercial arrangements.[48]

Unsatisfactory legislation: Already in Australia, three Federal Acts refer to the status of children born as a result of IVF procedures. The Marriage Act 1961 (Aust) s 92(3) was inserted in 1985. This is a cautionary provision, of local constitutional significance, designed to clarify the intention of the Federal Parliament and to make it plain that it has not "covered the field" so as to prevent the valid operation of

State and Territory law dealing with the status of children born as a result of AI or IVF.

The Family Law Act 1975 (Aust) was amended in 1983 by the insertion of s 5A. This section deals with the paternity of children born as a result of AI and IVF for the purpose of determining whether the child is "a child of the marriage". However, the determination is limited to "the purposes of the Act". It does not deal with the maternity of a child born through IVF. To this extent, there is a lack of uniformity in legislation. Some State jurisdictions provide for the maternity of a child born as a result of IVF using donated ova. The possibility that a person could be the father of a child born through IVF for the purposes of the Family Law Act, whilst another person could be the father under State or Territory law has to be contemplated where there has been an incomplete assimilation of the child born by these procedures as a child of the marriage for all purposes.

A similar lack of uniformity exists in Australia under the Australian Citizenship Act 1948 (Aust) which deals with the status of such children "for the purposes of that Act" using, relevantly, the same language as s 5A of the Family Law Act 1975.

It is not necessary to trouble an international conference with the intricacies of Australian constitutional law as it affects law governing children of a marriage. It is sufficient to note that there are problems in the enactment in Australia of comprehensive Federal legislation. It has been suggested that even the inadequate legislation which has been

enacted may be unconstitutional, in part.[49] The problem is that association with a "household" has been held insufficient, according to a majority of the High Court of Australia, to provide the necessary constitutional nexus to a relevant marriage to afford the Australian Federal Parliament legislative power.[50] This adherence to old definitions of "marriage", when social relationships, sexual attitudes and biological possibilities are changing so rapidly, presents difficulties to Federal countries legislating on these topics of family law. They are difficulties which unitary states need not face but are particularly acute because of the changing social attitudes and technological possibilities today.

BRAVE NEW WORLD?

So far as the status of children born by AI and IVF techniques is concerned, specific provision, unhappily in non-identical language, has been enacted in some of the States of Australia.[51] An Australian Senate Committee report has called attention to the quite unacceptable confusion, inadequacy and disuniformity of Australian law on this subject. The Senate Committee has recommended the basic uniform rule that a consenting married couple entering an IVF program involving donor gametes should be the legal parents for all purposes of any child born as a result.[52] The Committee has recommended that appropriate steps should be taken to ensure the classification of the status of children born through all methods of artificial reproduction. As noted by the Committee those procedures of reproductive technology now include AID, AIH, IVF, IVF with donor sperm, IVF with donor ova, IVF with

donor embryo, embryo transfer, IVF with surgical extraction of sperm, surrogate embryo transfer, freezing (cryopreservation) of sperm and the development of sperm banks, cryopreservation of embryos, super ovulation of the ovaries, ultra sound recovery of ova and surrogate motherhood. Research is continuing into the freezing of unfertilised ova, twinning, the development of substitute womb or uterus, ectogenesis or the growth of an embryo or foetus outside the human body, sex predetermination and embryonic experimentation. It can be seen that we are on the brink of still more remarkable developments.

The range of these procedures need only be stated for their significance for marriage and family law to be seen as a matter of plain concern. Accordingly to Professor Max Charlesworth, a thoughtful commentator on bioethical problems in Australia:

> "Mind-boggling issues will also arise when eventually human cloning, or asexual reproduction, becomes practicable, since with cloning the very concept of parentage collapses and the whole idea of human individuality and identity becomes quite problematic. In ordinary sexual reproduction male and female cells which each contain only one set of chromosomes are joined at fertilisation to form the embryo which has a double set of chromosomes. Through this combination of genetic material from two different parents the child is uniquely different from either parent. With asexual or clonal reproduction however the child is derived from a single "parent" and is thus genetically identical to or a

carbon-copy of that parent. (In cloning the nucleus of an unfertilised human ovum is removed (that is called enucleation) and it is replaced by the nucleus from an adult body cell of the "parent" (this is called renucleation). The renucleated ovum is then placed in a uterus for gestation and normal development.) What is the relationship between the cloned child and its "parent"? Genetically they are identical twins since they have the same genetic heritage. And what of the legal legitimacy or illegitimacy of the cloned child? Since cloning does not involve sexual intercourse between male and female partners the standard legal definitions of legitimacy no longer apply."[53]

CONCLUSIONS AND A PROPOSAL

Cloning in the human species may be some way off. But the techniques already with us challenge our notions of morality and our laws, including family law. Such legal responses as are produced by judges and legislators, if adequate when propounded, are soon overtaken by events. The hare of science and technology lurches ahead. The tortoise of the law ambles slowly behind. Beyond the significance of these developments for the reform of family law are more fundamental problems. They include the adaptation of notions of human rights to the potentialities of science and technology at the close of the 20th century. They also include the capacity of our legal system, its institutions and personnel to produce with anything like appropriate speed and satisfaction the legal responses. New institutions are needed to provide those responses in a

prompt and coherent way. Otherwise great injustice will be done and the law will increasingly be seen to be irrelevant, incompetent or obstructive.

This Commonwealth Law Conference would do a Commonwealth-wide service, if it were to call attention to these developments and urge the establishment of an international committee of interdisciplinary expertise to advise Commonwealth countries on the responses they might offer to the challenges of the reproductive technologies. After all, our legal system, its concepts, language and institutions remain basically similar. We still share a remarkably uniform system of the Common Law. And though family law is typically affected by local, religious and cultural factors, more than most, the challenge which is coming is universal. It is also urgent. Unless some international and interdisciplinary machinery is quickly set in place which can identify, and draft, legislative options, there can be no doubt whatsoever that a cascade of legal problems will present themselves to busy ministers, distracted officials and ill prepared judges. The time to start work has already passed. I hope that the international meeting of Commonwealth Law Ministers and Commonwealth Health Ministers will heed this call from Ocho Rios. If so, this Commonwealth Law Conference will have fulfilled an important function.

FOOTNOTES

* President of the Court of Appeal, Supreme Court, Sydney. Formerly Judge of the Federal Court of Australia and Chairman of the Australian Law Reform Commission. Views expressed are personal views only.

1. (1970) 125 CLR 383.
2. ibid, 395.
3. J.D.J. Havard, "The Influence of the Law on Clinical Decisions Affecting Life and Death" (1983) 23 Med. Sci Law 157, 164-5.
4. See eg Universal Declaration of Human Rights Article 16(3).
5. Law Commission (G.B.) Reform of the grounds of divorce: the field of choice (Law Com No. 6), 1966, Cmnd. 3123.
6. See eg Matrimonial Causes Act 1973 (UK) s 1; Family Law Act 1975 (Aust) s 48(1).
7. See Law Commission (Eng and Wales) Illegitimacy (Law Com 118) 1982. Cf British Nationality Act 1981 (UK) s 50(9). In Australia relevant legislation includes Children (Equality of Status) Act 1976 (NSW); Status of Children Act 1978 (Qld); Family Relationship Act 1975 (SA); Status of Children Act 1974 (Tas) and Status of Children Act 1974 (Vic). See also Status of Children Act 1978 (NT).
8. See eg De Facto Relationships Act 1984 (NSW). Cf New South Wales Law Reform Commission, De Facto Relationships, 1983 LRC 36.
9. Corbett v Corbett [1971] P 83. For further discussion, see also J. Dewar, "Transsexualism and Marriage" (1985) Vol. 15 No. 1 Kingston Law Review 58 and D. Pannick,

"Homosexuals, Transsexuals and the Sex Discrimination Act" (1983) Public Law 279.

10. Id, 106.

11. Sir Kenneth Fraser, M. O'Reilly and J. Rintoul "Hermaphroditus versus, with Report of a Case (1966) 1 Medical Journal of Australia 1003.

12. Ibid, 1006.

13. In Re C & D (1979) FLC 90-636 (CCH) (1979) 53 ALJ 659.

14. Cf Matrimonial Causes Act 1959 (Aust) s 18(1)(d) (now repealed).

15. H. Finlay, "Sexual Identity and the Law of Nullity" (1980) 54 ALJ 115.

16. R. Bailey "Family Law - Decree of Nullity of Marriage or True Hermaphrodite Who Has Undergone Sex Change Surgery" (1979) 53 ALJ 659, 660.

17. R. Wilson, "Life and Law: The Impact of Human Rights on Experimenting with Life" (1985) 17 Aust J Forensic Sciences 61, 79.

18. [1983] QB 1053.

19. [1983] 3 WLR 361, 370.

20. Holloway v Arthur Andersen & Co 566 F 2d 659 (1977).

21. Wilson, 80. See also A. Samuels "Once a Man, Always a Man; Once a Women Always a Woman - Sex Change and the Law" (1984) 24 Med Sci Law 163 and Cf Van Oosterwijck v Belgium (1981) 3 EHRR 557, a case in the European Court of Human Rights concerning a transexual's right to marry.

22. One practical problem faced in Victoria, Canada concerned the jailing of a transsexual convicted of trafficking in cocaine. The convicted person "got off on probation when

a judge agreed that to send him to either an all male or all female jail might be cruel and unusual punishment". Canadian Bar Association, National Vol. 13 No. 5 May 1986 p.7.

23. The problem presented by transsexuals was referred to the Australian Family Law Council by the Federal Attorney-General in 1983. The Council's advice was that, where a person had undergone a genuine operation after suitable counselling, that change should be recognised for relevant purposes and the sex of a person ought not to be treated as immutable but should correspond with that person's gender perception. So far as recent literature on non surgical approaches is concerned, see I.B. Pauly, "Outcome of Sexual Reassignment Surgery" in Aust and NZ Journal of Psychiatry, March 1981, 45; Walinder, Lundstrom and Thuwe, "Prognostic Factors in the Assessment of Male Transsexuals for Sexual Re-Assignment" in British Journal of Psychiatry, January 1978, 16; "Gender Identify Change in Transsexuals", American Medical Association, Archives of General Psychiatry, August 1979, 1001.

24. A. Grutzner, "Women seek in-vitro commission" The Canberra Times 12 May 1986, p.3.

25. Described in UKWP below and Warnock report, below.

26. "Male pregnancy is possible", Sydney Morning Herald Friday 9 May 1986, 11. See also D. Smith, "Breakthrough for Australian Scientists in race for male 'pill'". The National Times Newspaper May 9-15, 1986.

27. United Kingdom, Council for Science and Society, Report of a Working Party on Human Procreation: Ethical Aspects of the New Techniques OUP, 1984, 13 (hereafter UKWP).

28. H.M.S.O. London, Cmnd. 9314, 1984 (hereafter "Warnock Report"), 18.

29. UKWP 14. This estimate is probably conservative. The discussion paper of the New South Wales Law Reform Commission, Artificial Conception, November 1984, 10 estimated about 1000 AID births in Australia in 1983. This in turn is probably a significant understatement of the true figure.

30. Ibid, 15.

31. Id,

32. Warnock Report, 23-24.

33. Ibid, 25.

34. Id, 29-30.

35. Id, 37-8. See also W. Wadlington, "Artificial Conception: The Challenge for Family Law" 69 Virginia L. Rev 465 (1983).

36. R.P.S. Jansen, "Sperm and Ova as Property" in (1985) 11 JL Med. Ethics 123.

37. Ibid, 126.

38. Warnock Report, 47.

39. Victoria, Committee to Consider the Social, Ethical and Legal Issues arising from In Vitro Fertilisation, Interim Report, (September 1982); Report on Donor Gametes in IVF (April, 1983).

40. See also, "Report on Reproduction Technology of the Asche Committee of the Family Law Council" 60 ALJ 6 (1986).

41. Australia, Family Law Council Report on Reproductive Technology, "Creating Children", AGPS 1985. See also the news release of Mr. L. K. Bowen (Attorney-General) 21 August, 1985 69/85.

42. Ibid, 21 August, 1985 69/85

43. This is described by Dr. I. Johnston (Melbourne) in Australia Senate Standing Committee on Constitutional and Legal Affairs, IVF and the Status of Children, 1985, 6 (hereafter Senate Report).

44. In Re A Baby, unreported, Times Law Report 15 January, 1985.

45. Surrogacy Arrangements Act 1985 (UK) - not yet proclaimed as to its major provisions.

46. Infertility (Medical Procedures) Act 1984 (Vic).

47. Sydney Morning Herald, 31 January 1986.

48. Cf M.D.Kirby "From Hagar to Baby Cotton - Surrogacy, 85" in (1985) 25 ANZJ Obstetrics and Gynaecology 151.

49. See O. Jessep and R. Chisholm, "Children, The Constitution and the Family Court" (1985) 8 UNSWLJ 152, 168-9.

50. Cormick v Salmon (1984) FLC 91-554, (1984) 59 ALJR 151 (HC); Re Cook and Maxwell, JJ; ex parte C (1985) FLC 91-619, 10 Fam LR 99.

51. See Senate Report, 13. Note Artificial Conception Act 1984 (NSW); Artificial Conception Ordinance 1985 (ACT) and other legislation there mentioned.

52. Senate Report, 58.

53. M. Charlesworth, Biotechnology and Bioethics - New Ways of Life and Death (1984) 61 Current Affairs Bulletin, 4, 7.