
Commonwealth Developments in Health Law

Issue 1 : July 1981



Commonwealth Secretariat

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Printed and published by
The Commonwealth Secretariat

May be purchased from
Commonwealth Secretariat Publications
Marlborough House
London SW1Y 5HX

ISBN 0 85092 207 0

P R E F A C E

The Commonwealth Law Bulletin first appeared, as an occasional publication, in 1974, and has since developed into a regular, quarterly publication of some 400 pages. Principally designed to keep Commonwealth Law Ministers appraised of legal developments throughout the Commonwealth, it contains much information of interest and of relevance, among others, to Health Ministries. The purpose of these extracts from the Commonwealth Law Bulletin up to January 1981 is to make this material more readily accessible to Health Ministries. It is proposed to bring this up to date from time to time when sufficient further material has been published. In the interim, Health Ministries who wish to receive the Commonwealth Law Bulletin are welcome to join their colleagues who already do so by adding their addresses to the mailing list of the Commonwealth Secretariat's Legal Division.

Commonwealth Secretariat
Marlborough House
Pall Mall
LONDON SW1Y 5HX

June 1981

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Legislation

Australia

Health Insurance (Amendment) Bill 1977

Following upon a number of attempts to defraud the funds of Medibank, Australia's National Health Insurance Scheme, this Bill, introduced into Federal Parliament, seeks to amend the Health Insurance Act 1974 in order to substantially increase the penalties for such offences.

The present penalties of a maximum of six months' imprisonment or \$A500 fine for each offence will be increased substantially. Under the new penalty provisions, offences will be made indictable and will carry a maximum term of five years' imprisonment or a \$A10,000 fine. The offences will apply to all persons, including medical practitioners and their patients.

Australia— A.C.T.

Poisons and Narcotic Drugs Ordinance 1977

This Ordinance has been referred to the Territory's Legislative Assembly for its consideration. The Ordinance is based on the National Health and Research Council's uniform poisons standards, which lists a number of poisons and drugs according to their characteristics. The Ordinance also provides for increased penalties for illegal possession or trafficking in the dangerous drugs to which it refers.

Pregnancy Termination Bill 1978

The Australian Capital Territory's Legislative Assembly has rejected in principle this Bill that sought to prohibit the operation of private abortion clinics in the Territory, due to the fact that the Bill did not include all of the 51 recommendations that had been put forward for inclusion in the Bill by the Assembly's Standing Committee on Education and Health.

Transplantation and Anatomy Ordinance 1978

The Ordinance follows the recommendations of the Report of the Australian Law Reform Commission noted at (1978) 4 C.L.B. 350. Matters covered include the donation of tissue by living persons; donation of tissue after death; post-mortem examinations; donations for anatomical purposes; schools of anatomy; prohibition of trading in tissue; and a definition of "death" [which follows the wording set out at (1978) 4 C.L.B. 352].

Australia – New South Wales

Venereal Diseases (Amendment) Bill 1977

The New South Wales Government has introduced legislation in order to enable children over 14 years of age to be treated for venereal diseases at the State's Health Commission Venereal Diseases Clinics without the necessity of obtaining their parents' consent.

At present parents must give their consent before the Health Commission can treat children under 18 years of age for venereal disease. The Health Commission's adviser on communicable diseases has stated that the Government hoped that the Bill would, when enacted, help to break down the hesitation of many young people to receive appropriate and early medical treatment for venereal disease because of their fear of telling their parents.

After the Bill is enacted parental consent will still be necessary for the treatment of children under 14 years of age.

Noise Control Act 1977

The New South Wales Department of Labour and Industry proposes to introduce regulations to curb the increase in noise induced deafness among factory workers. Provision will be made for a maximum noise level of 90 decibels in factories and a maximum period of permitted exposure by workers to that level of noise.

The regulations, which have been drafted in consultation with other Australian states under a plan to provide for uniform noise laws throughout Australia, will provide for a maximum penalty of \$A500 for breaches of the law.

Dangerous Drugs

The New South Wales Government has introduced legislation to prohibit the growing of marijuana and other prohibited drugs. The new legislation also substantially increases the penalties for trafficking in addictive and prohibited drugs.

The state's Minister for Health has also announced that the state Government is considering banning the sale and distribution of books giving information relating to the growing and use of marijuana.

Sports Injuries Insurance Bill 1978

Workers' Compensation (Sporting Injuries) Amendment Bill 1978

The legislation, when passed, will establish a sport injuries insurance scheme.

The first Bill provides for compensation for a wide range of sport injuries, as well as back-dated payments to sportsmen and women who have suffered serious and permanent disabilities since 22 February 1977. Back-dated payments may also apply in cases of

sportsmen and women who suffered injuries causing death from that date.

The Government advertised in August 1978 that the insurance scheme would provide benefits of up to \$A60,000 for people who suffered severe spinal injuries in sports which applied for inclusion in the scheme. A minimum of \$A25,000 would be paid in the case of a person who died from a sporting injury.

The Attorney-General said that all Rugby League players under the jurisdiction of the State's major Rugby League bodies would be covered by the scheme. Other sports could also elect to become involved.

The more people covered by the scheme, the cheaper it would become to operate.

The initial premiums for adults would range from \$A2 a year for low-risk sports to \$A8 for sports such as Rugby League. The legislation also provides for the formation of a sporting injuries committee to administer the scheme.

The aim of the amendment to the Workers' Compensation Act was to continue to exclude people taking part in sporting contests or related activities from the provisions of the Workers' Compensation Act 1926. This would assist the transfer of sports to the new sports insurance scheme.

Australia— Northern Territory

Human Tissue Transplant Act 1979

This Act makes provision regarding the removal and use of human tissues, for the definition of "death" and for related purposes, implementing the recommendations of the Australian Law Reform Commission [ALRC 7] noted at (1978) 4 C.L.B. 350.

The Act defines "tissue" to include "an organ, or part of a human being or a substance extracted from, or from a part of, a human being" but not including a reference to foetal tissue, spermatozoa or ova. The Act makes specific provisions for donations of human tissue by adult persons, certificates by medical practitioners concerning the giving of such consents, the effect of such consents, donations of blood, revocations of consent, donations of tissue after death, the powers of hospital authorities to remove tissue where the body of a deceased person is at a hospital, consents by a coroner, prohibitions on trading in human tissues and the disclosure of information.

With regard to the definition of "death", the Act states that for purposes of the law of the Territory a person has died when there has occurred (a) irreversible cessation of all function of the brain of the person; or (b) irreversible cessation of circulation of blood in the body of the person.

Aged and Infirm Persons' Property Act 1979

This Act makes provision for the protection of the property of persons suffering from certain disabilities.

The Act, which comes into operation on the day on which the Mental Health Act 1979 (N.T.) comes into operation, repeals the application in the Territory of the Inebriates Act 1908 (S.A.) and vests jurisdiction in the Supreme Court of the Northern Territory to make protection orders in respect of the estates of persons resident or domiciled in the Territory whose estates are in need of protection.

The Act provides that applications for protection orders may be made by or on behalf of the person concerned by that person, a spouse or near relation by blood or marriage of that person or by the Public Trustee.

The Act stipulates that the Supreme Court shall not make an order in respect of the estate of a person unless it is satisfied that the person is, by reason of age, disease, illness or mental or physical infirmity, in a position which renders it necessary in his interests or the interests of those dependent on him that his estate should be protected.

The Act also provides that where a protection order is made, the Public Trustee, or one or more persons other than the Public Trustee, shall be appointed to be the manager of the persons estate. The manager is granted certain statutory powers in relation to the estate and is deemed to be a trustee of it.

Australia— Queensland

Child Abuse Bill

The Bill seeks to reduce the incidence of child abuse in the State.

It compels medical practitioners in the State to report all suspected cases of child abuse to the State health authorities. The reports of the medical practitioners' will be privileged against legal proceedings under the Bill and medical superintendants at hospitals will be empowered to order a child's detention in hospital for periods of up to 72 hours during which period medical tests can be performed to determine the child's condition. Such tests could be performed despite the contrary wishes of the child's parents or legal guardians.

Essential Services Bill 1979

This Bill would prohibit the closing down of the State's essential services as a result of industrial disputes. Under the Bill "essential services" are defined to include the public transport of people or freight (except taxi services), fire brigade services, hospital services, ambulance services, electricity, water, garbage, sanitary, and cleansing and sewerage services.

All or any of these essential services can be declared by the State's Governor-in-Council as a service to which the Bill, when enacted, will apply.

The Bill prohibits such acts as the lock-out of employees from an essential service and “sweetheart” agreements between trade unions representing an essential service body and their employer body, and hastens the industrial procedures whereby a State Industrial Commissioner is required to proceed from conciliation to arbitration after a period of 14 days.

The Bill also provides that—

- (i) illegal strikers are to be automatically dismissed if they remain on strike for more than 48 hours;
- (ii) requests for strike funds from persons who continue to work on essential services during an illegal stoppage are prohibited;
- (iii) persons who suffer damage or loss caused by illegal strikes in essential services have a right to sue the trade union concerned to recover damages or costs;
- (iv) a trade union involved in an illegal strike in an essential service may be de-registered and the office-holders of the union dismissed from office;
- (v) the positions of trade union office-holders of trade unions engaged in illegal strikes can be declared vacant;
- (vi) employees of an essential service who decide to continue to work in defiance of their trade union’s recommendations to engage in an illegal strike will be permitted to do so free from intimidation or discrimination; and
- (vii) the Minister of the Crown who is appointed to take control of an essential service during an illegal strike of its employees is empowered to direct all activities necessary to be performed by the service, including the requisitioning of property and the entry onto the property of the service.

The Bill provides that an emergency is limited to a period of one month, unless the period is extended by the Governor-in-Council for a further period or periods not exceeding one month.

Pregnancy Termination Control Bill 1980

This Bill was introduced by the State Minister of Health, who said he firmly believed the decision of the Government to tackle the abortion issue was in the interests of all Queenslanders, particularly the unborn—

In introducing the Bill, I am conscious of the fact that it will place the Queensland Parliament under the closest scrutiny, both in Australia and overseas. We will never be able to legislate on this issue to satisfy everyone. But at least we can make a genuine and honest attempt to protect the unborn child.

The Bill provides for—

- (i) imprisonment with hard labour for 14 years for a person attempting to procure miscarriage;
- (ii) a woman attempting to procure her own miscarriage would be liable to imprisonment for three months;

- (iii) a person supplying drugs or instruments to procure a mis-carriage would be liable to three years' imprisonment; and
- (iv) a lawful abortion is defined.

The Bill also seeks to provide for the necessity to prove that an emergency situation exists involving the serious risk of death of the woman with the continuation of the pregnancy. Two medical practitioners are each required to issue a certificate that they have each examined her and that an abortion is necessary to avoid the risk of her death.

The approval of the State Director-General of Health is required before any prosecution can be proceeded with under the Act.

“Pregnancies resulting from rape and incest and those exposing a woman to a serious risk of death, a potential suicide or self-inflicted grievous bodily harm, are cases where an abortion may be performed”, the Minister said. “Serious risk of major foetal abnormality or disease also provides legal ground for a termination of pregnancy. However, the Bill, in these instances, provides built-in conditions.”

The rape must have been reported to police within seven days and the abortion will have to be performed within 60 days of the report. Also a legally qualified medical practitioner must have examined the woman and be satisfied the pregnancy was a result of rape, by obtaining police verification. These conditions also applied to incest-induced pregnancy.

For a foetal abnormality abortion, a serious risk of major foetal abnormality or disease must be clearly demonstrated.

A person making a false statement to a doctor on the cause of pregnancy, and in order to obtain an abortion, will be liable to three years' imprisonment.

(Note: The Bill aroused considerable controversy, and was defeated.)

Australia — South Australia

Adoption Bill 1978

This Bill seeks to amend the law relating to the adoption of children by —

- (i) provisions for the establishment of a new Adoption Board to hear appeals against the decisions of Adoption Panels (the Adoption Panel will have as its members a clinical psychologist, a qualified medical practitioner registered as a specialist in gynaecology, a legal practitioner, a social worker, a nominee of the State Department of Community Welfare and two members of the public with a special interest in the adoption of children);
- (ii) providing that the ages of the proposed adopting parents should be not less than 25 nor more than 40 at the time they place their names on the Adoption Register, and that they must have been married for at least five years.

Rape

The South Australian Parliament has passed a Bill to amend the State's Criminal Law Consolidation Act which –

- (i) makes rape within marriage an offence;
- (ii) abolishes the presumption that a boy under 14 years of age is incapable of rape;
- (iii) prohibits the cross-examination of an alleged victim of rape as to her previous sexual experiences or morality unless permission is granted by the trial judge; and
- (iv) provides that the victim of a sexual offence need not appear at the preliminary hearing of charges against her alleged assailant unless she is directed to do so by the trial judge.

A husband will not, however, be guilty of the rape or indecent assault of his wife unless the alleged offence consisted of, was preceded or accompanied by, or was associated with assault occasioning actual bodily harm or a threat of such harm on his wife, an act of gross indecency or threat of such an act against his wife, or an act calculated seriously and substantially to humiliate the wife, or a threat of such an act, or a threat of the commission of a criminal act against any person.

The South Australian Government has announced that, in support of the legislation, it will establish a panel of medical practitioners, including women doctors, to examine alleged rape victims, and conduct an education course on the offence of rape for the instruction of the State's Police Force.

Similar legislation has been introduced by both the Victorian and Tasmanian Governments.

Australia – Tasmania

Mental illness

A Bill has been introduced into the Tasmanian Legislative Council that will enable the State's Attorney-General to exercise control over defendants who are found to be incapable of understanding court proceedings, or who are either insane or referred to a mental hospital for treatment.

Under the Bill to amend the State's Criminal Code Act 1924, a defendant who has been committed for treatment will be held under custody until he is fit to stand trial. Where, after a period of two years, it is considered that a person will never be able to stand trial, the Crown may decide not to proceed with the charge and the defendant will become a patient under a restriction order and the responsibility of the State's Mental Health Review Tribunal.

Psychologists Registration Amendment Bill 1979

This Bill, apart from providing for a minimum of two years' experience in the practice of psychiatry and proof of character to the State's Psychology Registration Board before a person can practise

as a clinical psychologist, seeks to regulate exhibitions of, and the practice of, hypnotism in the State.

The Minister for Health told the House of Assembly that the registration requirements were designed to protect the public from “unscrupulous people”, and that there was medical opinion that some people suffered bad side effects from being used as volunteers in an hypnotic demonstration on stage.

Australia— Victoria

Poisons (Drugs of Addiction) Act 1976

This Act, which came into operation on 31 August 1977, provides a maximum penalty for trafficking in cannabis of \$A4,000 or a term of imprisonment of up to 10 years. The penalties for trafficking in “hard drugs” such as heroin and LSD have been increased to a fine of up to \$A100,000 or a term of imprisonment of up to 15 years. The penalties for mere possession of illegal drugs are now \$A500 or up to a year’s imprisonment.

Possession of a quantity of more than 100 grams of cannabis is taken as prima facie evidence of trafficking in the drug. For LSD the specified quantity is 0.002 grams, and for heroin, morphine, methadone and cocaine, 2.00 grams each.

The powers of the police under the Act to apprehend suspected users or traffickers of prohibited drugs include the power to stop vehicles and vessels if the police have reasonable grounds of suspicion that such drugs are being used or trafficked in.

The Victorian Minister of Health has stated that the Victorian Government may decriminalise the possession of cannabis after studying the findings of three drug inquiries on the subject.

Status of Children (Artificial Insemination) Bill 1979

A Private Member’s Bill has been introduced into the Legislative Assembly which seeks to legitimate, in certain circumstances, children conceived by artificial insemination. The operative part of the Bill would insert a new section into the Status of Children Act 1974 of Victoria in the following terms—

5A. (1) A child born to a woman during her marriage or within ten months after the marriage has been dissolved by death or otherwise being a child conceived by her with the consent of her husband after artificial insemination with semen donated by a man not her husband shall be presumed to be the child of its mother and her husband or former husband, as the case may be.

(2) Without prejudice to any other mode of proof the production of a certificate filed with the Health Commission of Victoria purporting to be the certificate of a legally qualified medical practitioner who supervised the artificial insemination of a woman in the circumstances referred to in sub-section (1) that the insemination was performed in those circumstances with the consent in writing of the woman and her husband on the day and at the place referred to in the certificate shall be sufficient evidence of the facts stated in the certificate.

(3) Where the Health Commission of Victoria receives a certificate described in sub-section (2) the Commission shall cause it to be filed and kept confidential unless otherwise required by the order of a court.

Workers' Compensation Bill 1979

This Bill has been re-introduced following representations from the labour movement that the Bill, which was originally introduced in June 1979, should be amended. As amended, it now enables employees who are the victims of heart disease and strokes to receive worker's compensation provided that it can be proved that their employment made a substantial contribution to their physical ailments.

Child Abuse Bill 1980

This Bill seeks to monitor and control cases of child abuse in Queensland.

The State Minister for Health said new provisions in the legislation would ensure smooth, efficient, implementation of plans by the State's Co-ordinating Committee on Child Abuse.

The Minister said that the Bill would require medical practitioners who suspected that a child had been maltreated or neglected to notify immediately a person authorised by the Director-General of Health. Notification would provide a confidential central register of children who were at risk and those who had been abused. Persons in certain positions under the Health, Children's Services and Police Departments would form Suspected Child Abuse and Neglect teams. They would be responsible for acting on behalf of the Director-General in the care of abused children.

The Minister said that every team would include a medical practitioner, a social worker and a police officer. The teams' duties would include ensuring that intervention was justified and co-ordinated; to respond to mandatory notification of child abuse; and to provide a continuing management plan for each child and family.

Australia— Western Australia

Health Act Amendment Act 1978

By the amendment—

- (i) a standard scale of penalties is introduced for offences relating to the sale of food, drugs, therapeutic substances, disinfectants and pesticides;
- (ii) local authorities are given the power to grant financial or other assistance towards the provision and maintenance of community health centres and land and buildings to provide practice or living accommodation for the use of private medical or dental practitioners; and

- (iii) expert statutory committees are established to study perinatal and infant deaths and anaesthetic deaths.

Poisons Act Amendment Act 1978

In order to tighten control over the supply of addictive drugs authority is written into the Act to regulate the issue of prescriptions for drugs of addiction and specified drugs. It is intended that supplies of addictive drugs to addicted persons will be confined to authorised outlets and subject to reasonable limitation.

Any person who contravenes or fails to comply with any conditions, limitation or restriction of any notice given by the Commissioner of Public Health pursuant to regulations made under the above amendment will be liable to a maximum penalty of \$500 for a first offence and \$3,000 for a second or subsequent offence.

Bahamas

Dangerous Drugs (Amendment) Act 1980 (No. 1 of 1980)

This Act amends the Dangerous Drugs Act in a number of important respects—

- (i) it amends s. 2(1) (definitions) by redefining certain terms — e.g. “Indian hemp”, is given a wider meaning, by substituting the words “any plant of the genus cannabis” for “the plant cannabis sativa” in the original definition. It also redefines the terms “export”, “import”, and “in transit”, taking into account the change in the status of the Bahamas Islands from a colony to a sovereign State;
- (ii) sections 3, 4 and 7 (which deal with restrictions on cultivation, importation, exportation, and prohibition of certain drugs) are amended by the creation of specific offences in respect of the breach of those sections;
- (iii) section 8 (which makes it a criminal offence to engage in certain acts) is amended in paragraphs (c) and (d) by, in effect, turning the offences created by those paragraphs from being offences of strict liability into offences requiring a mental element. The offences are permitting the use, or being concerned in the management, of premises for the purpose of preparation of opium for smoking or sale;
- (iv) paragraph (c) of s. 10 (which deals with the control of manufacture and sale of cocaine) is amended to extend its application to registered dentists and licensed veterinary surgeons;
- (v) section 16 (which deals with dangerous drugs in transit) is strengthened by the creation of a specific offence for the breach of that section, and provision is made for the mandatory seizure and forfeiture to the Crown of the subject matter of the offence;

- (vi) a new Part VA, restricting or prohibiting the possession and supply of dangerous drugs but with savings in the case of qualified and authorised persons, is also introduced;
- (vii) the Act as a whole is further strengthened by the inclusion of two new sections 27A and 27B which give a general power of seizure of both the subject matter of the offence and articles used in connection with the offence.

Bangladesh

Pharmacy Ordinance, 1976 (XIII/76)

This Ordinance provides for the establishment of a Council to be known as the Pharmacy Council of Bangladesh, whose functions shall be —

- (i) to prescribe subjects for, and approve courses of study and practical training in, pharmacy for the purpose of admission to examinations to be approved by it;
- (ii) to prescribe conditions and procedure for admission to such examinations;
- (iii) to recognise degrees or diplomas in pharmacy for the purpose of registration as pharmacists; and
- (iv) to register pharmacists and grant certificates of registration and to prepare and maintain register of pharmacists and apprentices in pharmacy.

The purpose of the Ordinance is to regulate practice in pharmacy and to make registration as a pharmacist a pre-requisite for practice so that persons not properly qualified may be excluded.

Environment Pollution Control Ordinance 1977 (Ord. no. XIII of 1977)

This law provides for the control, prevention and abatement of pollution of the environment of Bangladesh. It envisages constitution of a Board to be called the Environment Pollution Control Board, the functions of which shall, inter alia, be—

- (i) to formulate policies for the control, prevention and abatement of pollution of the environment;
- (ii) to suggest, measures for the implementation of its policies.

Further, for the purpose of the execution of the policies of the Board there shall be an implementation cell consisting of such officers and employees as the Government may determine. A Director appointed by the Government shall be the executive head of the implementation cell, and shall be responsible for the implementation of the projects approved by the Government and of the policies formulated by the Board. The Director shall have the power to require, by order in writing, any person or commercial or industrial undertaking to adopt such measures for the prevention, control and abatement of pollution of the environment, and to

furnish such information relating thereto as may be specified in the order; failure to comply with such order or, where an appeal is preferred under s. 8(2) of the Ordinance with the final decision thereon, shall be punishable with imprisonment for a term of up to one year, or with fine of up to five thousand Taka, or both.

Prevention of Malaria (Special Provisions) Ordinance 1978 (No. IV of 1978)

This Ordinance provides for, inter alia—

- (i) formulation of schemes and adoption of co-ordinated measures for prevention of malaria;
- (ii) laying down the policy in accordance with which the Directorate of Health Services shall execute any such schemes or measures; and
- (iii) evaluation and assessment of the execution of the schemes and measures.

A scheme or measure formulated or adopted may relate to—

- (a) the spraying of buildings and other premises with insecticides;
- (b) the survey of the country;
- (c) the medical examination of the people;
- (d) the treatment of persons suffering or suspected to be suffering from malaria;
- (e) the delimitation of malarious areas free from malaria and measure to prevent appearance or re-appearance of malaria in the latter areas; and
- (f) such other measures considered necessary for carrying out the purposes of this Ordinance.

Under the provisions of this Ordinance the Government or any person authorised by it in this behalf may, by order—

- (a) require any person to undergo medical examination and treatment;
- (b) require every person having knowledge or information of any case of malaria or suspected malaria to report the case to any specified authority;
- (c) require every person coming from a malarious area and entering a malaria-free area to report for examination at the nearest malaria detection post on arrival at the destination;
- (d) require any employer in the district of Chittagong Hill Tracts to furnish to the nearest malaria detection post particulars of his employees coming from any other district so that necessary measures for their protection against malaria may be adopted;
- (e) prohibit from washing, white-washing, plastering, painting or the application of any other surface treatment to any building or other premises sprayed with insecticide during a period of five months from such spraying; and

- (f) prohibit the doing of anything with respect to any engineering, agricultural and industrial projects which may increase the extent and spread of malaria.

Contravention of any provision of this Ordinance is punishable with imprisonment for three months or a fine of Taka 500, or both.

International Centre for Diarrhoeal Disease Research, Bangladesh Ordinance 1978 (LI of 1978)

This Ordinance provides for the establishment of an international centre for diarrhoeal research in Bangladesh with multinational scientific collaboration and financial contributions to conduct research in diarrhoeal diseases and related subjects.

The aims and objectives of the Centre are declared to be –

- (a) to function as an institution to undertake and promote study, research and dissemination of knowledge in diarrhoeal diseases and the directly related subject of nutrition and fertility with a view to developing improved methods of health care and for the prevention and control of diarrhoeal diseases and the improvement of public health programmes with special relevance to developing countries;
- (b) to provide facilities for training to Bangladeshi and other nationals in areas of the Centre's competence in collaboration with national and international institutions, but not to include the conferring of academic degrees.

An Interim International Committee is constituted for the purpose of assisting in the establishment of the Centre. The Interim Committee consists of the United Nations Development Programme (Chairman) and the following initial members: The Government of Australia, the Government of Bangladesh, the Government of the United Kingdom, the Government of the United States of America, the Ford Foundation, the International Development Research Centre, the United Nations Fund for Population Centre, the United Nations Fund for Population Activities, the United Nations Children Fund and the World Health Organisation.

The Interim Committee is required to take steps to establish a Board and would stand dissolved when the Board first meets, unless the Board otherwise resolves. The Board will consist of 16 members: three nominated by the Government of Bangladesh; one nominated by the WHO; eleven chosen initially by the Interim Committee from amongst its members; and the Director of the Centre. Provision is made to ensure adequate representation by developed and developing countries.

The general direction, management and administration of the affairs of the Centre will rest in the Board which will have full authority to determine and execute the policies and undertakings of the Centre within the framework of the Ordinance.

Other provisions relate to the procedure at meetings of the Board, the establishment of Committees, financial matters, and immunities and privileges.

Medical and Dental Council Act 1980 (No. XVI of 1980)

This Act repeals and, with certain modification, re-enacts the Medical Council Act 1973, to provide for the constitution of a Medical and Dental Council, to regulate the registration of medical practitioners and dentists and to establish a uniform standard of basic and high qualifications for medicine and dentistry.

The Council is a body corporate and consists of ex-officio, nominated and elected members representing a wide variety of interests, including the teaching and practising professions. There is provision for an Executive Committee of the Council which consists of seven members, five of whom are to be elected by the Council from amongst its members.

The Act makes provision for the recognition of medical qualifications granted by medical institutions in and outside Bangladesh. The Council is empowered to enter into negotiations with appropriate authorities in any State or country outside Bangladesh for settling a scheme of reciprocity for the recognition of medical qualifications and to amend, in pursuance of any such scheme, the Schedule showing qualifications granted by institutions outside Bangladesh so as to include any medical qualification which the Council has decided to recognise.

The Act also makes provision for the recognition of dental qualifications granted by dental institutions in or outside Bangladesh and for the registration of medical licences or diplomas granted by medical institutions in or outside Bangladesh.

The Council is empowered to require the medical and dental institutions in Bangladesh which train for or grant degrees, qualifications, licences or diplomas to furnish such information as to courses of study and examinations as it may consider necessary. It is obligatory for the Executive Committee to appoint medical and dental inspectors to attend at any or all of the examinations held by medical or dental institutions for the purpose of granting recognised medical or dental qualifications, or in respect of which recognition has been sought.

Procurement or attempt to procure by any person to be registered under the Act as a medical practitioner or dentist by means of any false or fraudulent representation or declaration, either orally or in writing is punishable by imprisonment, or by a fine.

Belize

Meat and Livestock Ordinance 1977

This Ordinance establishes a Meat and Livestock Commission whose purpose is to oversee the breeding, grading, import and export, slaughter, and packing of livestock with a view to maintaining quality in a fast growing export field. The Commission collects a cess on all cattle sold for slaughter or export. The Ordinance also sets up a Livestock Producers Association whose purpose is the promotion, encouragement and development of the breeding of better livestock by providing technical advice and information and the promotion of cooperation and goodwill among producers and exporters. Membership of the Association is open to all producers of livestock. The Association also negotiates the prices to be paid for cattle by companies purchasing them for slaughter. The costs of the Commission and the Association are to be met by monies collected by way of cess. The accounts of the Commission are to be submitted to the Minister to be laid before the National Assembly.

Dentists (Amendment) Bill 1979

This Bill seeks to amend the principal Ordinance (Cap. 81) to permit trained dental auxiliaries specifically authorised by the Chief Medical Officer to extract teeth.

Bermuda

Medical Practitioners Amendment Act 1980 (No. 66 of 1980)

This amending Act provides for the establishment of the Bermuda Medical Council. The Council is empowered, inter alia, to register medical practitioners and specialists as well as to strike off the name of a registered medical practitioner if the Council is of the opinion that such practitioner is unfit, by reason of a defect or defects in his personal character or by reason of his habitual inefficiency or habitual negligence to continue to have his name on the register. In the case of a specialist, the Council is required to consider, on the expiry of one year after registration, whether he should continue to be treated as such.

Canada

Social Services Financing Bill

In March 1978 the Federal and Provincial Ministers of social services reached an agreement on a proposal to block finance, the federal contribution to the cost of social services in Canada which will result in a new Social Services Financing Act. The services to be financed under the proposed Act include crisis intervention services, information and referral services, family planning services, meal services, employment-related services, transportation services for the disabled, children's services, rehabilitation services, social integration services, day care services for children, day care services for adults, home support services, counselling services, and certain

developmental and preventative services to communities. The Act would cover social services developmental activities, the administration of social services, the administration of nursing home and adult residential services, and the administration of public assistance.

A separate Rehabilitation Fund is proposed to provide conditional cost-sharing in the amount of \$50 million over a period of five years, for the development of rehabilitation facilities and capital expenditure programmes whose purpose is to integrate the disabled into the community.

Under the block financing arrangement, financial contributions to the provinces are determined by a formula which includes current expenditures on social services, an annual escalation based on changes in the gross national product and the population, an additional amount to provide for more comprehensive coverage, (first payable in 1979-80) and a levelling adjustment that would gradually eliminate over a ten-year period, the provincial differences above or below the national average contribution by Canada so that at the end of the period each province would be receiving the same per capita amount. A similar funding arrangement has been in effect since 1977 for health services.

There are two conditions which the provinces would be required to meet under the block funding arrangement—

- (a) a province cannot impose on Canadian citizens or landed immigrants, a period of residence in a province or in Canada as a prerequisite for receiving a social service, and
- (b) a province must provide the federal government with comparable cost and programme data on an annual basis for the services being block funded.

The legislation provides that the Federal payments will be guaranteed for five years. The Minister will be authorised at any time after 1 April 1980 to give notice of intention to terminate block financing three years from the date on which such notice is given.

The Federal government will continue to share 50 per cent of the provinces' costs of providing social assistance direct to individuals, and for this purpose will retain the Canada Assistance Plan.

Canada – Nova Scotia

Mental Health legislation

The amendments made to the Public Hospitals Act of Nova Scotia (re-titled the Hospitals Act) by Chapter 45 of the Statutes of 1977, came into force on 1 April 1979. The major portion of that Act made far-reaching new provisions governing the admission into hospitals and treatment of patients suffering from psychiatric disorders, designed to safeguard and protect their rights.] An article on these innovations by Lorne E. Rozovsky, under the title “New Developments in Nova Scotia Psychiatric Legislation” has been published in [1979] 5 Dalhousie Law Journal 505.)

The new provisions have the following principal features –

- (i) every person admitted to a psychiatric facility is first admitted as a person under observation, and not as a patient. He must be examined by a physician of the facility within 24 hours of admission and by a psychiatrist within three days of admission. The period of observation can last no longer than seven days;
- (ii) involuntary admission for observation can only occur by one of the following means –
 - (a) a person may be detained in a hospital for observation on the basis of two medical certificates, each signed by a physician who has examined the person. Each certificate must state that the physician has reasonable and probable grounds to believe that the person suffers from a psychiatric disorder, that he should be admitted to the facility because he requires the in-patient services there, and that he requires care that cannot be adequately provided outside the facility because he is a danger to his own safety or the safety of others,
 - (b) a magistrate may direct two physicians to examine a person and determine whether the person's mental health justifies the completion of medical certificates for involuntary admission to hospital. If the person cannot be examined by the physicians, the magistrate may issue a warrant for the person's apprehension and direct that a medical examination be performed. This examination may take place in a hospital, medical facility, physician's office, or other suitable place, but not a jail or lockup unless no other suitable place is available,
 - (c) if a peace officer has reasonable and probable grounds to believe that a person suffers from a psychiatric disorder, and is a danger to his own safety or the safety of others, or is committing or about to commit an indictable offence, the officer may take the person to an appropriate place for medical examination. The physicians examining the person determine whether medical certificates should be completed for involuntary admission to hospital. Every peace officer who apprehends a person under these circumstances must file a report with the Attorney-General within 24 hours of the apprehension;
- (iii) following the observation period, a person will either be released, admitted as an informal patient or admitted to hospital as a formal patient;
- (iv) if, during the initial seven days observation period, a psychiatrist on the staff of the facility makes a written declaration stating that the person suffers from a psychiatric disorder (defined as meaning any disease or disability of the mind

including alcoholism and drug addiction) and is a danger to his own safety or the safety of others, the person will continue to be detained in the facility for treatment as a formal patient. If no declaration has been completed, the person must be released from the facility unless he wishes to remain as an informal patient;

- (v) if the mandatory examination by a psychiatrist determines that a patient in a hospital is capable of consenting to treatment, no treatment can be given without his consent. If a patient is found to be incapable of consenting, treatment can only be given upon obtaining the consent of his guardian if he has one, or if he does not, upon obtaining consent of his spouse or next of kin, or where they are not available, upon obtaining consent of the Public Trustee. This examination, to determine capacity of consent to treatment, must occur at least every three months for the first year during which the person is a patient, and at least once every 12 months thereafter;
- (vi) provision is made to allow an appropriate person to administer a patient's estate if a psychiatrist on the staff of the hospital determines that the person is not competent to administer it himself. An examination to determine a patient's competence to administer his estate must be performed at least once every three months for the first year during which the person is a patient and at least once every 12 months thereafter;
- (vii) no psychosurgery can be performed unless the patient to be treated consents, has been assessed at a specially designated facility, the treatment has been recommended by two independent psychiatrists as well as the patient's personal psychiatrist, and is performed at a specially designated hospital. In addition, all proposals for psychosurgery must be reviewed by an independent Review Board to make certain that the regulations governing it have been followed. If the patient is not capable of consenting, consent must be obtained from his guardian, spouse, next of kin or the Public Trustee;
- (viii) a Review Board of not less than three members is established and given authority to: determine whether a patient should continue to be held under formal admission; review declarations of capacity to consent to treatment, declarations of competency to administer an estate; make recommendations respecting the treatment or care of any patient; advise on where a patient can receive the best treatment; and to determine whether all requirements have been met before psychosurgery is performed at any time. Subject to certain restrictions, it must make such a review at the request of (a) the patient, (b) any person authorised by the patient to act on his behalf, (c) the administrator of the facility, (d) the medical director of the

facility, (e) the administrator of psychiatric mental health services of the Province, or (f) the Minister of Health. In addition, the Review Board must review the file of each patient detained under a declaration of formal admission at least once every six months for the first two years during which the person is a patient, and at least once every 12 months thereafter, regardless of whether or not the patient asks for such a review. The Review Board may conduct a hearing when reviewing a patient's file and the patient may be represented by his lawyer, or some other person;

- (ix) the Act gives a person under observation, or a patient, the right to send mail freely and have reasonable access to letter writing materials and stamps. The administrator of the hospital may be present at the opening of mail and remove harmful contents. There is also the right to make and receive unmonitored telephone calls, except that outgoing calls may be prohibited where, in the opinion of a psychiatrist, this would be detrimental to the person making the calls or to others. Visitors are allowed at all reasonable times and circumstances. The facility must post patients' rights and, at a patient's request, provide assistance in understanding them, in contacting a lawyer and in applying for a review by the Review Board;
- (x) hospital records are confidential and ordinarily may be examined only with the patient's consent. Exceptions to this rule include hospital staff, a patient's physician, the courts, and the Minister of Health. A hospital or a physician may refuse to make information in a patient's records available if he has reasonable grounds to believe it would be against the patient's best interests to do so;
- (xi) an informal patient is discharged in the same way as a patient is discharged from any hospital; that is, he may leave either on the advice of his physician, or against medical advice;
- (xii) a formal patient may be discharged only by a psychiatrist of the hospital. However, the patient, his guardian, his spouse, or the next of kin may apply to the Review Board, or to a judge of the County Court for an order for discharge;
- (xiii) a patient may be transferred to another facility if it is in his best interest to be so transferred, or if he is a resident of the area served by the other facility. The nearest relative must be notified of the transfer if the patient so desires.

**Canada—
Prince Edward
Island**

Public Health Act (1980)

This Act, when proclaimed, will replace the Public Health Act, R.S.P.E.I. 1974, Cap. P.29, and also the Venereal Disease Prevention Act, R.S.P.E.I. 1974, Cap. V-2. The background to, and the philosophy of, the legislation was explained in the following

terms, in the Explanatory Notes which accompanied its introduction—

It has been prepared by the Department of Health with advisory consultation from most other provincial departments, members of professional (medical, nursing) and trade (restaurant, dairy, tourism) associations, municipal health officials, legal counsel, federal public-health specialists and comparable legislation from all across Canada.

The existing Public Health Act's last significant revision was in 1951, but its essential character dates from the 1920's and 30's when there was little provincial government and public health meant rudimentary sanitation and suppression of epidemic diseases: smallpox and measles, tuberculosis and typhoid fever. Because of this origin and half-century history, the Act is cluttered with anachronisms, rambling appendage clauses and procedural details. More important, its basic concept of the communal health and the role of health officers as needle-giving and privy-policing simply does not address the greater part of what has come in the past decade to be recognized as "Health".

Thus this bill embodies a philosophy that includes health-care services, research and professional education, safety, rehabilitation and positive lifestyle promotion: public health is not merely contagious-disease control but touches any condition which may affect the well-being of a significant element of the province's population. Though broader in concept, the bill is much shorter because of the deletion of many obsolete specifics and a more sensible organization. It has been de-particularized in several areas, leaving much of the detail, especially for the now rare threats such as tuberculosis (20 sections in the current Act), to be fleshed out, and adapted according to changing conditions and newly significant diseases or problems, in the form of regulations.

The Public Health Act is the fundamental legislative authority for most of any department of health's routine activities. And it must at base make provision for strong, direct authority so that immediate action can be taken to protect the public's health in times of danger. That is the basis of every Public Health Act, for although they have fortunately subsided over recent decades, the chain-reaction threats to the community's health do still exist.

Canada— Québec

An Act to secure the handicapped in the exercise of their rights 1978

The main intent of this Act is to ensure handicapped persons the full and equal recognition and exercise of the rights and freedoms shared by all citizens. A handicapped person is any person limited in the performance of normal activities who is suffering, significantly and permanently, from a physical or mental deficiency, or who regularly uses an orthopedic device or a prosthesis to palliate his handicap.

This act establishes a board to provide services to the handicapped (the *Office des personnes handicapées du Québec*), which will see to the co-ordination of the services provided for the handicapped, inform and advise handicapped persons, promote their interests and facilitate their educational, vocational and social integration.

The Board (*Office*) will be empowered to grant subsidies to promotional organizations mainly devoted to the assertion of the rights and promotion of the interests of the handicapped. It may also issue "adapted work centre" certificates to associations or organisations employing, in majority, handicapped persons incapable of working under ordinary conditions, to allow them to utilize and develop their capacity for work under appropriate working conditions.

This Act provides various measures designed to ensure the educational, vocational and social integration of the handicapped person. For that purpose, the Act provides, in particular, for the formulation and carrying out of service programmes which must take account of the free choice of each person benefiting from such programmes. The board (*Office*) may grant material assistance to a handicapped person for the carrying out of a service programme, in proportion to his needs. It may also enter into a contract, with any employer and a handicapped person eligible for a service programme, for the vocational integration of such person into the labour market.

This Act provides that the board (*Office*) will be empowered to grant subsidies to an employer to allow him to adapt job openings to the capacities of a handicapped person or to otherwise promote his employment. It requires any employer having 50 employees or more, in co-operation with the representative of the association of employees where that is the case, to submit a programme for the hiring of handicapped persons to the board (*Office*) for approval.

This Act requires certain public transport companies and every telephone undertaking governed by the Public Service Board (the *Régie des services publics*) to submit to the Minister of Transport (the *ministre des transports*) or to the Minister of Communications (the *ministre des communications*), as the case may be, a development programme designed to ensure handicapped persons access to means of transportation and telephone services within a reasonable time. Moreover, every owner of an immoveable not subject to the Building Code will be required to submit to the approval of Minister of Labour and Manpower (the *ministre du travail et de la main d'oeuvre*) a development programme designed to ensure within a period of five years, accessibility to his immoveable for handicapped persons. The Government, by Regulation, may exempt certain types of classes of submitting a development programme. The Minister of Labour and Manpower (the *ministre du travail et de la main d'oeuvre*) will also be empowered to exempt the owner of an immoveable from submitting a programme, in certain cases.

This Act amends various existing laws, in particular, the Charter of Human Rights and Freedoms, to provide that there be no discrimination against a person on the ground that he is handicapped or uses any device as a palliative to his handicap. This amendment is accompanied with the transitional provisions necessary to allow

handicapped persons access to immoveables, means of transportation and telephone services.

The Municipal Code, the Cities and Towns Act and the charters of certain municipalities are amended to provide that the construction, reconstruction or relocation of sidewalks must be so done by municipal corporations as to facilitate access to them and their utilization by handicapped persons. The Acts establishing transit commissions are amended to compel these commissions to set up a special transit system for handicapped persons unable to use the regular public transit system, or see that such a system is organised.

The Collective Agreement Decrees Act is amended to make it applicable to the work performed by a blind employee or an employee whose physical or mental capacities are limited.

The Minimum Wage Act is amended to prevent the Minimum Wage Commission (the *Commission du salaire minimum*) from imposing, on an employee whose physical or mental capacities are limited, working conditions other than those provided in its ordinances.

Finally, the Act provides that handicapped persons aggrieved pursuant to certain decisions of the board (*Office*) will be entitled to appeal from such decisions to the Social Affairs Commission (the *Commission des affaires sociales*), and that the Act to ensure the handicapped in the exercises of their rights will be binding on the Crown.

An Act respecting Occupational Health and Safety (1979)

The purpose of this Act is to provide mechanisms for worker-employer participation in eliminating causes of work accidents and occupational diseases. In that regard, it sets forth the rights and obligations of those workers, employers, owners and suppliers who are made subject to the Act.

The right of a worker to work conditions that have proper regard for his health, safety and physical well-being is recognised, as is his right to refuse to perform work should he have reasonable grounds for believing that such work would endanger his health, safety or physical well-being or would expose another person to such danger. That right of refusal cannot be exercised, however, if his non-performance of the work puts the life, health, safety or physical well-being of another in immediate danger, or if the conditions under which the work is to be performed are conditions normal to his type of work. A worker also has the right to protective re-assignment of duties in the case where his exposure to a contaminant is a danger to him in his present state of health.

A pregnant worker is entitled to protective re-assignment where her work conditions present physical danger to her unborn child or to herself. A woman is also entitled to protective re-assignment if her

work conditions are such that they constitute a danger to the child she is breast-feeding.

The Act provides for the creation of one or more health and safety committees in certain categories of establishments, determines their composition and the mode of appointment of the members, their functions and the frequency of meetings. Provision is also made for the appointment of safety representatives from among the workers in certain categories of establishments and their functions are defined.

Joint sector-based associations may be established to provide the workers and employers of the sector concerned with training, information and counselling services in matters of occupational health and safety.

The public health establishments are given responsibility for organising and dispensing health services at the workplace. The functions of the employer, the health and safety committee, the community health department, the hospital centre, the Minister of Social Affairs and the Commission de la santé et de la sécurité du travail (occupational health and safety commission) are prescribed in regard to the preparation and implementation of health programmes. The mode of appointment of the physician in charge of health services in an establishment and the content of an establishment's particular health programme are provided for. The health services existing at 20 June 1979 (the date when the Act in Bill form was introduced) may be recognised by a hospital centre insofar as they are equivalent to those envisaged in the Act.

A new agency is established called the Commission de la santé et de la sécurité du travail (mentioned above); it replaces the Commission des accidents du travail du Québec (Québec Workmen's Compensation Commission) and has responsibility for implementing the occupational health and safety plan. The Commission is administered by a board of directors with equal employer and worker representation and it has regulatory powers for carrying out its duties.

The Act provides for the appointment of inspectors to ensure compliance with its provisions; inspection costs are assumed by the Government.

Besides being subject to the other provisions of the Act, the construction sector receives particular attention through provisions specifying the obligations of principal contractors and employers, establishing job-site committees and detailing their composition and functions, appointment of safety representatives, special conditions attaching to inspections, and rules applicable to major construction sites.

Workers are provided with recourses if they are laid off, discharged, suspended, transferred or otherwise subjected to discriminatory or disciplinary action for exercising a right or carrying out a function which is their prerogative under the Act. Penalties are provided for offences under the Act and the Labour Court is

empowered to make orders. Transitional measures to deal with existing Acts and regulations are included and provision is made for the Government to designate a Minister responsible for the application of the Act.

Cyprus

Dentists (Associations, Discipline and Pension Fund) (Amendment) Law 1977 (No. 33 of 1977)

The Disciplinary Board now comprises—

- (i) the President of the District Court or a Senior District Judge nominated by the Supreme Court, as Chairman;
- (ii) a Counsel of the Republic nominated by the Attorney-General of the Republic;
- (iii) two Dental Officers nominated by the Minister of Health as ex-officio members; and
- (iv) three dental practitioners of whom two must have exercised their profession for at least ten years, elected every three years by the Annual General Meeting of the Pancyprian Dentists Association.

Medical (Associations, Discipline and Pension Fund) (Amendment) Law 1977 (No. 32 of 1977)

The Disciplinary Board now comprises—

- (i) the President of the District Court or a Senior District Judge nominated by the Supreme Court, as Chairman;
- (ii) a Counsel of the Republic nominated by the Attorney-General of the Republic;
- (iii) two Medical Officers nominated by the Minister of Health as ex-officio members; and
- (iv) three Medical Practitioners of whom two must have exercised their profession for a period of at least 15 years, elected every three years at the Annual General Meeting of the Pancyprian Medical Association.

Meat Hygiene Law (Law 94 of 1979)

This Law provides that no person shall slaughter, cause or allow the slaughter of any animal except in a slaughter house save in cases where an animal is slaughtered for personal consumption; that no person shall cut, display for sale or store up fresh meat or any of its by-products except within a shop. The law also makes provision for the inspection of animals before and after they are slaughtered by a government veterinary officer.

Drugs (Control of Quality, Supply and Prices) (Modification) Law 1980 (No. 30 of 1980)

This law amends the basic law and provides, inter alia, that the Minister of Health is entitled, when fixing the highest price of

medical supplies or the highest proportion of profit which one may be allowed to get from the sale of medical supplies, to take into account, when he deems it in the public interest, the existing prices of sale of such medical supplies in any foreign country in which the economic conditions and the way of living are similar to those in the Republic.

Transportation Allowance to Incapacitated Persons Law 1980

In this Law incapacitated person means a permanently incapacitated citizen of the Republic who by birth or due to a subsequent event is partly or totally incapacitated. His incapacity must derive from a serious distortion or serious mutilation of the legs, total loss of sight or any other connected cause and the transportation of the incapacitated person for the purpose of attending his work becomes difficult as a result of the nature and degree of his incapacity.

The Law sets up a Special Committee responsible for the granting of the transportation allowance as well as a Special Fund which will consist of government grants.

The question whether an incapacitated person is entitled to a grant is determined by the Special Committee on the advice of the Medical Council as to the nature and degree of his incapacity. The amount of the grant is determined by the Committee after a detailed examination into the financial position of the incapacitated person and his travelling expenses incurred for the purpose of attending his work.

Health Protection (Smoking Control) Law 1980 (No. 51 of 1980)

This Law provides for the taking of measures for the restriction of smoking.

Section 3 provides that irrespective of the provisions of any other law a supplier of tobacco to a person under the age of 18 years is guilty of an offence and liable, in the case of a first conviction, to a fine not exceeding £100 and in case of subsequent convictions to a fine not exceeding £200. After the fourth conviction the Court may order that the license of the convicted person to sell tobacco be revoked and that he may not be allowed to obtain such a license for a period not exceeding five years.

Section 4 of the law sets up a Commission for the control of advertisements of tobacco. By s. 5 the transmission of such advertisement by radio or television is prohibited. Smoking in public places is also prohibited (s. 10).

These legislative measures are in accordance with the provisions of the Cyprus Constitution and are necessary for the protection of public health (Para. 2 of Article 25 of the Constitution).

Dominica

Medical (Amendment) Bill 1979

This Bill would amend the Medical Act (Cap. 149) to enable the Medical Board to issue a licence to a person to administer by

injection under the skin or otherwise such drugs for the treatment of such diseases as the Board specifies, or for anaesthetic purposes, if the Board is satisfied that the person concerned –

- (a) is adequately trained and otherwise competent to administer by injection or otherwise the drugs in respect of the administration of which the licence is sought;
- (b) is in the public service or a nurse in private practice;
- (c) is working under the orders and general supervision of a medical officer in the public service.

These provisions would not apply to any person working under the immediate personal supervision of a registered medical practitioner.

The Board would have power, at any time, to cancel a licence granted under this new provision, and such a licence would expire at the end of the year in which it was issued.

Fiji

Medical Assistants Bill 1978

This Bill is to provide for the regulation and control of “medical assistants”, the first group of whom qualified in January of this year. Various designations were considered (e.g. “para-medics”, “primary health officers”, “medical auxiliaries”) until finally “medical assistants” was settled on. They are trained to provide a basic health service, particularly in outlying rural areas where fully qualified medical practitioners are not readily available and are to be specially registered and disciplined by a Medical Assistants Registration Council. They may only be employed in government service and are prohibited from receiving any fee or other reward from any other source unless it has been authorised by the Permanent Secretary of Health acting with the approval of the Minister.

Medical Assistants Regulations 1978

The Regulations concern duties of medical assistants. They are authorised to act only within the defined limits of the areas to which they are posted and to issue certificates of temporary incapacity for work for up to seven days in any one month in respect of any one person.

They are also required to refer to a medical practitioner any person –

- (a) in respect of whom they are unable to establish a diagnosis,
- (b) whose condition demands immediate surgical intervention,
- (c) whose condition does not respond to treatment within a reasonable time.

A medical assistant is to perform such medical and administrative functions as are assigned to him by the Permanent Secretary, which may include any or all of the following duties –

- (a) in the absence of a medical practitioner to undertake medicolegal work of a non-specialist nature including the giving of medical evidence before any court, tribunal, commission or other body duly constituted under the provisions of any written law;
- (b) to perform simple laboratory tests;
- (c) to operate any portable X-ray unit and to interpret simple films;
- (d) to assist registered nurses and midwives in the discharge of their duties;
- (e) to provide advice, guidance and assistance in matters relating to family planning;
- (f) to promote and participate in programmes relating to health education, disease control and sanitation;
- (g) to form and maintain health records;
- (h) to exercise administrative control over any medical unit or part thereof.

Every medical assistant is required to accept and comply with the legal, ethical and moral responsibilities associated with the practice of medicine.

Fiji Sports Council Bill 1978

The Bill seeks to fulfill a long felt need amongst sporting bodies in Fiji by establishing a Council whose functions will be –

- (a) to foster and promote the development of amateur sport and recreation in Fiji;
- (b) to foster support and undertake the provision of facilities for sport and recreation;
- (c) to promote the utilisation of sporting and recreational facilities in Fiji;
- (d) to investigate developments in sport and recreation and disseminate knowledge and information about such developments;
- (e) to advise the Minister on any matters relating to sport and recreation.

Private Hospitals Bill 1979

This Bill seeks to introduce legislation for the purpose of controlling private hospitals and nursing homes and ensuring that proper standards are maintained. The Bill therefore provides for a system of licensing of private hospitals and similar institutions.

Provision is made for the establishment and membership of the Private Hospitals Board and for its procedure. The Bill makes provision for the licensing of private hospitals and makes it an offence to operate such a hospital unless it is licensed. No person may use the term “hospital” in respect of any place which is not licensed. Before a licence may be granted the Minister must be satisfied that the conditions specified are satisfied. Licences would specify the type of service which is provided and the number of

patients who may be accommodated. In case of emergency the number may be exceeded in certain circumstances.

The Board would be given power to revoke a licence in certain circumstances subject to notice affording the licensee an opportunity to show cause why revocation should not take place. Power is also given to the Board to refuse the renewal of a licence when the hospital is not operated in accordance with the Act. An appeal lies to the Minister against the decision of the Board to revoke or refuse a licence.

Provision is made for there to be a resident superintendent in every private hospital, and the licensee is required to keep a register of patients giving certain particulars. The procedure to be carried out in the case of the death of a patient is also specified.

No structural alteration may be made to a hospital without the Board's approval. The Bill makes provision for the appointment of Inspectors, and for the inspection of private hospitals and also of places suspected of being used as hospitals. Every private hospital is to be inspected at least once annually.

Pharmacy and Poisons (Amendment) Bill 1980

This Bill seeks to amend the Pharmacy and Poisons Act to make provision for regulating and controlling the manufacture of medicine in Fiji as well as wholesale dealings in medicines and advertisement of medicines. The opportunity has been taken to include provision for the establishment on a statutory basis of the Fiji Pharmaceutical Society, and to make certain other amendments to the Pharmacy and Poisons Act to bring the law in line with modern developments and practices.

The memorandum of Objects and Reasons explains that from time to time studies have been carried out by private companies as to the feasibility of manufacturing medicines in Fiji, and interest in this matter has grown considerably in recent years. It is considered timely to enact provisions now to ensure that in the event that medicines are manufactured in Fiji, modern standards as to safety and quality will be observed.

Wholesale dealings in medicines are not now regulated by the Act and whilst there is at present a limited regulation of certain advertisements, it is considered that existing provisions do not provide adequate protection to the public. The Bill therefore seeks to make provision with regard to wholesale importation of medicines and to make further provision regarding wholesale distribution of medicines.

It is also proposed to expand the scope of s. 16 of the Act so as to regulate advertisements of medicines relating to all diseases which may from time to time be prescribed by regulations made by the Pharmacy and Poisons Board with the approval of the Minister; and to prohibit false or misleading advertisements.

Gilbert Islands Medical Assistants Ordinance 1978 (No. 5 of 1978)

This Ordinance makes provision for the registration of medical assistants and for the regulation of their practice, in the service of the Government. A Medical Assistants Board is established with the following duties—

- (a) to form and keep a register of medical assistants,
- (b) to arrange for and regulate courses for training for medical assistants and the examination of such persons seeking admission to the register,
- (c) to make provision for the issue of certificates to medical assistants registered under the Ordinance.
- (d) to regulate, supervise and restrict the practice of medical assistants.

The Board is given power to grant a certificate to any person (entitling him or her to be registered as a medical assistant) who has one or other of the following qualifications—

- (i) has undergone a course of training approved or prescribed by the Board in an institution approved by the Board and has passed, to the satisfaction of the Board, an examination approved by the Board; or
- (ii) is or has been registered as a medical assistant, or in a similar capacity, in a country where the standard of training and examination is no lower than that required by the Ordinance, and satisfies the Board as to his good character; or
- (iii) possesses such other special qualifications as in the opinion of the Board justify admission to the register.

Provision is made for the removal of the name of a person from the register upon conviction of an offence punishable by more than six months' imprisonment, or, after due enquiry by the Board, for serious misconduct in a professional matter. An appeal lies to the High Court from the Board's decision.

Guyana Medex Act 1978 (Act No. 19 of 1978)

The introduction of "Medex" as an extension of the health services now available in Guyana is intended to provide much needed assistance to medical practitioners, particularly in the rural areas, in providing health care for the people of Guyana.

This Act provides for the registration as "Medex", of persons who are certified by the University of Guyana as having successfully undergone an approved programme of training or who are similarly certified by a recognised institution outside Guyana. Provision is also made for publication annually of a list of persons registered as "Medex" and for the removal from the register of the names of any medex guilty of negligence or misconduct.

Medical Service (Amendment) Act 1979 (No.4 of 1979)

This Act amends the Medical Service Ordinance to reconstitute the Medical Board, to make provision for the registration of persons practising osteopathy, and to regulate the practice of osteopathy in Guyana.

A person may only practise or hold himself out as practising osteopathy if he is registered as an osteopath under that Ordinance. In order to be registered, a person must be the holder of a diploma, degree, fellowship, membership licence, certificate or other status or form of recognition granted by a University, College or other body empowered to confer authority to practise osteopathy by the law of the country or place where it is granted and which, in the opinion of the Board, is evidence of satisfactory osteopathic training.

A registered osteopath is entitled to take and use the title of doctor of osteopathy.

Hong Kong

Pharmacy and Poisons (Amendment) Ordinance 1977

Provisions similar to those applying to dentists will apply to registered pharmacists who will be obliged to obtain annual practising certificates from the Pharmacy and Poisons Board.

The Ordinance also brings up to date the definitions of “pharmaceutical products” and “medicine” to conform with those used by the World Health Organization.

Dentists Registration (Amendment) Ordinance 1977

This Ordinance contains provisions, which will come into effect on 1 January 1978, whereby registered dentists will be required to obtain annual practising certificates from the Dental Council.

Law Amendment and Reform (Consolidation) (Amendment) Ordinance 1978 (No. 2 of 1978)

The law [briefly noted at (1978) 4 C.L.B. 530] concerns liability to a child in respect of disabilities with which it might be born (i.e. born alive—the moment of a child’s being when it first has life separate from its mother). If a child is born disabled as a result of an occurrence before its birth, and a person other than a mother is responsible for that occurrence, the child’s disabilities are to be regarded as damage resulting from the acts of that person and actionable accordingly at the suit of the child. An “occurrence” to which the law applies is one which affected either parent’s ability to have a normal, healthy child or affected the mother during pregnancy or the child during birth, so that the child was born with disabilities which otherwise would not have been present. A defence is provided where a person acted in a professional capacity in treating or advising a parent provided he took reasonable care having due regard to the then current state of professional opinion.

executive Committees to deal with applications for licences etc; and to make provision for appeals against the decisions of such committees and the Board.

Pneumoconiosis (Compensation) Ordinance 1980 (No. 51 of 1980)

This Ordinance establishes a scheme for compensating persons or their dependants for incapacity or death resulting from pneumoconiosis.

The compensation which is to be on the same scale as workmen's compensation, is to be paid from a Pneumoconiosis Compensation Fund to be financed by levies on the construction and quarry industries and contributions by the Government. The Fund will be administered by a Board, the Fund Board, which will also be responsible for making recommendations concerning the rate of levy.

India

Mental Health Bill

This Bill seeks to provide for the treatment and care of the mentally ill, and modifies the concept of "lunacy". It replaces the Lunacy Act of 1912 which has been described as anachronistic and ill-suited.

Hospitals and Educational Institutions (Conditions of Service of Employees and Settlement of Employment Disputes) Bill 1978

This Bill seeks to give employees of educational, scientific, research and training institutions protection on the lines of that available to workmen under the industrial disputes legislation. The Bill's Statement of Objects and Reasons explains that while such employees need this protection (and a machinery for the resolution of their individual and collective employment disputes) the institutions by which they are employed have special characteristics requiring the maintenance of an atmosphere devoid of strife. For these reasons they have been excluded from the operation of the Industrial Relations Bill noted above.

The Bill applies to hospitals, educational, scientific, research and training institutions, in which 20 or more persons are employed or were employed on any day of the preceding twelve months. Employees drawing wages exceeding the prescribed amount would not be covered by the Bill. Certain other categories of employees are also excluded.

The Bill's principal features are the following—

- (i) the Bill enjoins an employer to constitute, within a specified period, a Grievance Settlement Committee for the resolution of individual employment disputes, and a Consultative Council and a Local Consultative Council for the resolution of employment disputes of a collective nature. It also provides for the arbitration of disputes not resolved by the Committee or the Councils;

- (ii) there is provision for the recognition of an association of employees which has the support of the majority of employees in an establishment. The representatives of employees on the Committee and the Councils would be nominees of a recognised association. Since the Bill provides effective machinery for the resolution of individual and collective employment disputes, lock-outs or strikes would be prohibited;
- (iii) where any matter is referred for arbitration under the provisions of the Bill, the arbitration award would have to be given within a specified period. Employers and employees would have the right to choose arbitrators either from the panels maintained by the appropriate Government or from outside. Matters which would constitute individual employment disputes include termination of employment of any employee whether by way of discharge, dismissal or retrenchment or otherwise, suspension and computation of moneys due to an employee. Matters which would be employment disputes of a collective nature include wages and allowances, hours of work, leave with wages and holidays, rationalisation, medical benefits, superannuation benefits and rules of discipline;
- (iv) the Central Government would be the appropriate Government in respect of establishments which are under its control or those which have branches or units or offices in two or more States – in respect of others the State Government would be the appropriate Government.

Jamaica

The Status of Children Act, 1976

The Act removes at one stroke most, if not all of the obvious legal disabilities of children conceived and born out of wedlock by abolishing illegitimacy itself. It also overcomes some of the lingering difficulties in identifying the father of a child by widening the ways in which paternity may be established, including the use of blood tests in court proceedings.

Maternity Leave Act 1979 (No. 44 of 1979)

This Act, which came into operation on 31 December 1979, provides for the right of female workers to be granted maternity leave by their employers and to receive maternity pay in some cases.

Basically, the female worker who comes within the scope of the Act is one who has entered into, or works under, a contract with an employer, whether the contract is express or implied and (if it is express) whether it is oral or in writing and whether it is a contract of service or apprenticeship. This includes any such individual who is employed in the service of the Government (including service in the Jamaica Defence Force and Jamaica Constabulary Force.)

Subsection (1) of s. 3 of the Act sets out the circumstances under which a duty arises in the employer of a female worker who comes within the

scope of the Act to grant her maternity leave, namely, if that female worker—

- (a) informs the employer that she is, or wishes to be, absent from work wholly or partly because of her pregnancy or confinement and that she intends to return to work with the employer;
- (b) has been continuously employed by the employer for a period of not less than fifty-two weeks at the date on which her absence begins, or, being in seasonal employment, has been engaged by that employer in that employment for periods which amount to not less than fifty-two weeks during the five years immediately preceding that date; and
- (c) produces for the inspection of the employer, if the employer so requests, a certificate from a registered medical practitioner stating that it is necessary for the worker to be absent from work wholly or partly because of her pregnancy or confinement.

Subsection (2) of s. 3 stipulates the period (or, if more than one, the aggregate of periods) for which a worker is entitled under subsection (1) to be granted maternity leave, namely, the period or periods during which she is absent from work wholly or partly because of her pregnancy or confinement. This, however, is subject, save in certain specified cases, to a limitation of 12 weeks in respect of each pregnancy or confinement.

By virtue of subsections (3) and (4) of s. 3 the 12 weeks limitation on the period of maternity leave does not apply if the worker who has been granted maternity leave for 12 weeks in respect of a pregnancy or confinement furnishes her employer with a certificate from a registered medical practitioner certifying that as a result of her illness arising from that pregnancy or confinement or as a result of the state of health of the child to whom she has given birth, it is necessary for the worker to be absent from work for an additional period, not exceeding 14 weeks, specified in the certificate. For this purpose, the worker must submit herself or the child, as the case may require, to a medical examination by a registered medical practitioner chosen and paid by her, if her employer requires her so to do. Her employer may require that this medical examination be carried out in the presence of, and in consultation with, a registered medical practitioner chosen and paid by the employer. If there is a disagreement between the two registered medical practitioners the matter is required to be referred to the Chief Medical Officer, and any decision made by him or by a registered medical practitioner nominated by him is made final. In this case, the additional leave granted would begin immediately after the end of the initial 12 weeks.

Subsection (5) of s. 3 of the Act provides that any period (not exceeding three weeks) which is required for the determination of any medical question in relation to the grant of additional leave shall be regarded as leave granted to the employee pursuant to s. 3.

Section 4 gives to every worker to whom maternity leave is granted an entitlement to return to work—

- (a) with the employer who granted the leave or, where appropriate, his successor;
- (b) in the capacity and place in which she was employed under the original contract of employment, to do work of the nature for which she was employed under that contract of employment;
- (c) on terms and conditions that, as regards seniority, pension rights and other similar rights, the period of her employment immediately prior to her absence on maternity leave shall be regarded as continuous with her employment following that absence.

This entitlement does not arise however, unless the worker serves on her employer or, where appropriate, his successor, at least three weeks before the day on which she proposes to return to work, a notice that she proposes to return to work on that day. Nor does it arise in an employee if the Minister by Order provides that the subsection which gives the entitlement shall not apply to any worker who immediately prior to her absence on maternity leave was employed, under her contract of employment, to do work of a nature specified in the Order and the employee is such a worker. Further, the provisions as to entitlement may apply with modifications if the Minister makes an Order to that effect.

Special provision is made by subsection (4) of s. 5 for the case where a worker who is entitled to return to work has notified a day of return but there is an interruption of work (whether due to industrial action or some other reason) which renders it unreasonable to expect the worker to return to work on that day. In that event the worker may instead return to work when work resumes after the interruption or as soon as is reasonably practicable thereafter.

Special provision is also made by subsection (5) of s. 4 to cover the case where a worker is entitled to return to work, but it is not practicable by reasons of redundancy for the employer to permit her to do so. In that event she is entitled, where there is a suitable available vacancy, to be offered alternative employment with her employer, or his successor, or an "associate employer" as defined in the Act, under a new contract of employment—

- (a) under which the work to be done is of a kind which is both suitable in relation to the worker and appropriate for her to do in the circumstances;
- (b) the provisions of which as to the capacity and place in which she is to be employed are not less favourable to her than if she had returned to work in accordance with her entitlement to do so.

In this case too, she is entitled to return to work on terms and conditions that as regards seniority, pension rights and other similar rights, the period of her employment immediately prior to her absence on maternity leave is to be regarded as continuous with her employment following that absence.

Where a worker who is entitled to return to work has complied with the provisions of the Act but is unable to return to work by reason of redundancy, she is required to be treated for the purposes of the Employment (Termination and Redundancy Payments) Act—

- (a) as having been continuously employed by her employer until the notified day of return; and
- (b) as if her employment had been terminated by her employer by reason of redundancy and without notice on the notified day of return.

A female worker granted maternity leave under the Act is entitled under s. 5 of the Act to maternity pay in respect of the first eight weeks of her maternity leave beginning on, or falling after, the first day of the eleventh week before the expected week of her confinement—in the Act called "the relevant day"—provided that—

- (i) she comes within the definition in the Act of "qualified worker", that is, that on "the relevant day"
 - (a) she is not less than 18 years of age, and

- (b) is not employed as a domestic worker as defined in the National Insurance Act;
- (ii) she informs her employer (in writing if the employer so requests) not less than two weeks before the relevant day or, if that is not reasonably practicable, as soon thereafter as reasonably practicable, of the expected week of her confinement;
- (iii) she produces for the inspection of her employer, if her employer so requests, a certificate from a registered medical practitioner or a registered midwife stating the expected week of her confinement; and
- (iv) that the employer has not granted her maternity leave with pay under the Act in respect of three or more pregnancies before “the relevant day”.

The Act also provides as to the records to be kept by employers who come within the scope of the Act and imposes penalties for contravention of the provisions of the Act. It also makes it an offence for an employer without reasonable cause to terminate the employment of a worker wholly or partly because of her pregnancy or confinement. The section which creates these offences does not, however, apply to the Government.

Section 9 requires that nothing in the Act is to be construed as preventing any worker from being granted maternity leave for any period in excess of the period specified in the Act or from being paid in respect of any period of maternity leave an amount in excess of the maternity pay specified by the Act.

National Insurance (Amendment) (No. 2) Act 1979 (No. 43 of 1979)

This Act, a companion measure to the Maternity Leave Act (noted at page 27 of this issue), creates a new benefit under the National Insurance Act 1966, namely a maternity benefit. “Maternity benefit” is defined as including maternity allowance to domestic workers and maternity grants to certified exporters. The details of the benefit conferred are set out in the new ss. 20A and 20B added by the amending Act.

By s. 20A a domestic worker who is an insured person is entitled to a maternity allowance in respect of a pregnancy or confinement if she satisfies the relevant contribution conditions. This provision is specifically designed to benefit domestic workers as they are not entitled to maternity leave pay under the Maternity Leave Act.

The fourth Schedule of the principal Act is amended to prescribe the contribution conditions for maternity allowance. These are that not less than 26 contributions must have been paid as a domestic worker in the period of 52 weeks immediately preceding the period for which allowance is payable. For the purpose of this requirement a domestic worker may, in relation to any pregnancy, elect to have the 52 weeks period determined by reference to any date not earlier than 11 weeks before her expected week of confinement for that pregnancy.

The amount payable as maternity allowance is equivalent to the national minimum wage in force at the time of entitlement. This allowance will be payable for eight weeks from the week of claim, if the claim is made prior to the date of confinement, or the date of confinement, in any

other case. The allowance is not payable in respect of any period earlier than 11 weeks before the expected date of confinement. Also, it is not payable unless the claimant confirms the date of confinement or expected date of confinement by furnishing one of the following—

- (i) a certificate from a registered medical practitioner,
- (ii) a certificate from a registered midwife, or
- (iii) such other evidence as the Minister shall consider satisfactory.

The new s. 20B deals with maternity benefit conferred on certified exporters. A certified exporter is one whose business falls within the scheme for the encouragement of exports introduced by the Government on the 3rd day of January 1979 under Ministry Paper No. 47 of 1978. The section gives to an employer in such a business who has, pursuant to the Maternity Leave Act, paid maternity leave pay for eight weeks to an employee in that business who is an insured person, the right to a maternity grant. This maternity grant is to be equivalent to the amount, less any statutory deductions, paid to that employee in respect of the last two weeks of the eight weeks. A further condition for eligibility of a maternity grant stipulated is that not less than 75 per cent of the total labour force employed by the employer in that business should consist of female labour.

Kenya

Medical Practitioners and Dentists Act 1977 (No. 20 of 1977)

The Act consolidates and amends the law relating to the registration of medical practitioners and dentists. A Medical Practitioners and Dentists Board is established consisting ordinarily of—

- (a) the Chairman, to be appointed by the Minister;
- (b) the Director of Medical Services or the person for the time being acting in that post;
- (c) a Deputy Director of Medical Services, to be nominated by the Minister;
- (d) four medical practitioners to be nominated by the Minister;
- (e) a representative of the Faculty of Medicine of the University of Nairobi who shall be nominated by the Faculty Board; and
- (f) five medical practitioners and two dentists, who shall be elected by the votes respectively of all medical practitioners and of all dentists at the prescribed times and in the prescribed manner.

The Board is given responsibilities in relation to the eligibility of persons to be registered under the Act, and power to exercise disciplinary control over the profession. Penalties are provided for practising by unregistered or unlicensed persons, and prosecutions may only be instituted with the consent of the Attorney-General.

The Board is given power to license persons not otherwise eligible, to render medical or dental services in the following terms—

13(1) Notwithstanding any of the other provisions of this Act, the Board may, if it is satisfied that it is in the public interest to do so, confer upon any person who is not otherwise eligible to be registered as a medical practitioner or as a dentist under the provisions of this Act, by the issue, under the signature of the Director of Medical Services, of a licence to do so, the right to render medical or dental services.

(2) Every such licence shall be for such period and may contain such conditions as the Director of Medical Services shall, with the consent or on the instruction of the Board, impose.

(3) Any licence issued under this section may be cancelled or revoked and withdrawn at any time by the Director of Medical Services with the consent or on the instructions of the Board.

Veterinary Surgeons (Amendment) Bill 1979

This Bill seeks to amend the Veterinary Surgeons Act (Cap. 366) in a number of ways. The following would be qualified to be registered under the Act as Veterinary Surgeons—

- (a) holders of a degree in veterinary science of a university in Kenya approved by the Board; or
- (b) holders of a degree in veterinary science of any other university approved by the Board; or
- (c) holders of a degree, diploma or other qualification in veterinary science, who have satisfied the Board by examination that their professional knowledge and skill are equivalent to those of persons registerable under paragraph (a) or (b).

The Board would have power, if it is of the opinion that any degree approved by it is no longer of a satisfactory standard, at any time to cancel such approval; but no such cancellation would invalidate the registration of any person who had been registered prior to the cancellation.

The Bill contains provision for the supervision by the Board of courses and examinations leading to degrees in veterinary science in Kenya to ensure as far as possible that professional standards in Kenya remain as high as those elsewhere.

Whenever the Board is satisfied that it is in the public interest so to do, it would have power, in its discretion, to grant a licence to practise veterinary surgery to any person who holds a veterinary qualification which would entitle him to practise veterinary surgery in the country in which it was awarded.

The Bill also makes a number of minor, consequential and other amendments to the principal Act, some to rectify anomalies or out-dated provisions.

Medical Practitioners and Dentists (Disciplinary Proceedings) (Procedure) Rules 1979 (L.N.No.157 of 1979)

These Rules, made by the Minister of Health under the enabling provisions contained in the parent Act (Cap.253), make provision for the procedure to be followed in disciplinary proceedings against members of the medical and dental professions.

Proceedings relating to applications for restoration to the register are also regulated.

Medical Practitioners and Dentists (Private Practice) Rules 1979 (L.N. No. 182 of 1979)

These Rules, made by the Minister under s. 23 of the Medical Practitioners and Dentists Act (Cap. 253), regulate general and specialist practice, private clinics, private clinical and radiological laboratory medicine, and nursing homes and hospitals.

Since their promulgation, these Rules have been amended by Legal Notices Nos. 288 and 289 of 1979.

Lesotho

Natural Therapeutics Practitioners Act 1976 (No. 14 of 1976)

This Act prohibits persons whose names do not appear on the register maintained by the registrar (an officer in the Ministry of Health designated by the Minister of Health) from practising as natural therapeutics. "Natural therapeutics", as defined by the Act, mean services for the purpose of preventing, healing or alleviating sickness or disease or alleviating or preventing or curing pain by any means other than those normally recognised by the medical profession and includes methods commonly used by homeopaths, naturopaths, osteopaths, chiropractors and acupuncturists.

Malaysia

Medical (Amendment) Act 1976

The Act amends the Medical Act 1971 —

- (i) to provide that a person who holds a suitable qualification in medicine and surgery but one which is not listed in the Second Schedule to the Act, must in addition to any other existing requirements, pass an examination to be prescribed or set by a body approved by the Minister before he can become entitled to be provisionally registered as a medical practitioner;
- (ii) to enable a medical student if he does so under the control and supervision of a fully registered medical practitioner holding a valid and current annual practising certificate, to carry out, in pursuance of his studies, any investigation, examination or treatment of patients in any medical or health institution approved by the Minister;
- (iii) to extend the period of compulsory medical service for national purposes from not less than two years to not less than three years.

Malta

Control of Tattooing Act, 1976

The legislation seeks to control tattooing by subjecting its performance to the possession of an appropriate licence. Not only is it made an offence for an unlicensed person to perform the act of tattooing, but it is also made an offence for a person to seek to be tattooed by any person other than a person in possession of a valid licence.

Children and Young Persons Bill 1979

This Bill seeks to make new provision for the care of children and young persons (those under the age of 16 years). A court convicting a child or young person would be given power to commit him to the care of the Minister for a period between one and five years not extending beyond his 18th birthday if the court is of the opinion that—

- (a) none of the other methods in which the case may be dealt with is suitable, and
- (b) he is in need of care or control which he is unlikely otherwise to receive.

An order made under these provisions would be subject to appeal in the usual manner.

The Bill would also make provision for the other circumstances in which care orders can be made and sets out the powers and duties of the Minister in relation to children and young persons in care.

A Children and Young Persons Advisory Board would be established whose members would be appointed by the Minister and whose membership would include a “mother”, and a person who, in the opinion of the Minister, has an adequate knowledge of psychology, one of whom would be the chairman of the Board.

Prevention of Disease Ordinance (Amendment) Act 1980 (No. 25 of 1980)

This Act amends the principal law (Cap. 59) in a number of ways. Inter alia, it makes provisions—

- (i) for controlling and regulating the rearing and keeping of animals;
- (ii) for controlling and regulating the movement of animals from one place to another;
- (iii) for controlling and regulating the collection and transport of swill and the feeding of swill to animals;
- (iv) increasing the maximum fines payable on a wide range of offences under the principal law.

Dangerous Drugs (Amendment) Act 1980 (No. XXIII of 1980)

This Act imposes harsher punishments on “drug pushers” and attempts to rehabilitate, rather than punish, drug addicts by amending the Dangerous Drugs Ordinance (Cap. 161). It achieves this object by—

- (i) substituting for s. 8 of the Ordinance a new s. 8 by which any person who has in his possession, cultivates, produces or sells “Indian hemp” whether the whole or any portion of the plant, or the resin obtained therefrom but excluding its medicinal preparations, commits an offence;

- (ii) substituting for ss. (2) and (3) of s. 22 of the Ordinance dealing with penalties new sub-sections which have the effect of increasing the minimum and maximum penalties and providing for the forfeiture of all articles in respect of which the offence was committed, with savings in the case of registered drug addicts;
- (iii) providing for the revocation of the licence to practise his profession of anyone licensed under the Ordinance or under the Medical and Kindred Professions Ordinance who is convicted of any offence under the Ordinance.

Nauru

Abortion Law

In the Penal Code Bill 1977, section 377 will permit the termination of pregnancy if –

- (i) The termination is carried out by a medical practitioner, and
- (ii) Two registered medical practitioners are of the opinion, formed in good faith either –
 - (a) that the continuance of the pregnancy would involve risk to the life of the pregnant woman or of injury to her physical and mental health greater than if the pregnancy were terminated, or
 - (b) that there is a substantial risk that if the child were born it would suffer from such physical or mental abnormality as to be seriously handicapped; and
- (iii) The prior consent of the pregnant woman, if she is capable of giving consent, has been obtained; and
- (iv) Where the pregnant woman is married, the prior consent of her husband or, if he is not readily available to give his consent or is not capable of stating whether or not he consents, the prior consent of the most closely related adult member of her family who is readily available and is capable of stating whether or not he consents has been obtained or where the pregnant woman is not married the prior consent of the most closely related adult member of her family who is readily available and is capable of stating whether or not he consents has been obtained.

In determining whether the continuance of a pregnancy would involve such risk of injury to health as would allow termination on the grounds of injury to her physical or mental health, accounts may be taken of the pregnant woman's actual or reasonably foreseeable environment.

The provisions are to be the subject of a "free vote".

Sale of Liquor Amendment Act 1976

This Act makes significant changes to the complex laws which regulate the sale of liquor in New Zealand, and without diminishing this complexity represents a further step towards the treating of the consumption of alcohol as an adjunct of everyday life rather than as an end in itself. Perhaps the most noteworthy features of the Act are those which allow for young people to be gradually introduced to the moderate use of liquor in a controlled social environment. Although the minimum drinking age of 20 years was retained as the result of a non-party vote in Parliament the law will now allow liquor to be supplied in hotels, taverns and clubs to persons 18 years and over where accompanied by an adult spouse or parent. Children of all ages may accompany their parents into designated family lounge bars and be supplied with liquor. A new type of licence – the general ancillary licence – is introduced and is available to sporting associations, ethnic and cultural groups and the like, where the consumption of liquor is merely incidental to some other principal activity. These clubs will be authorised to sell liquor to their members and guests on any day except Good Friday (this in itself represents a significant liberalisation of the general prohibition on Sunday trading). Provision is also made for the extension of trading hours in respect of some types of licences, notably hotels and taverns, which may be permitted (on individual application) to stay open until 11 p.m. on Friday and Saturday nights.

The New Zealand wine industry is given encouragement by the creation of a vineyard bar permit which enables the winemaker to sell his product for consumption on his premises. Unlicensed restaurant permits may be granted, allowing diners in unlicensed restaurants to consume liquor they have themselves provided.

Alcoholic Liquor Advisory Council Act 1976

This Act implements the recommendation of a recent Royal Commission on liquor that the personal, social and economic evils flowing from the misuse of alcoholic liquor be attacked by setting up an Alcoholic Liquor Advisory Council. It provides for the establishment of a body of nine members – six appointees of the Governor-General and three representatives of relevant Government Departments – who are collectively charged with the task of seeking to encourage temperate attitudes and practices in respect of liquor and to reduce the harm it presently causes. Broadly, the functions of the Council will be to promote research into the use and misuse of liquor, disseminate information about liquor-related problems, stimulate education programmes, and provide for the care and rehabilitation of those already suffering from or because of the misuse of liquor. The Council will work in close co-operation with any existing bodies, associations or persons engaged in activities in these fields, and may

appoint advisory and technical committees or co-opt specialist advice. The financing of the Council's activities is to be by way of a levy on all liquor imported into or manufactured in New Zealand.

Contraception, Sterilisation and Abortion Act 1977

In recent and controversial legislation following in the wake of the report of the Royal Commission on Contraception, Sterilisation and Abortion (noted at (1977) 3 C.L.B. 472) the New Zealand Parliament has enacted new laws, the procedural elements of which are designed to ensure that abortions are available only in strict compliance with the law.

Although rejecting the Royal Commission's recommendation that panels consisting of two doctors and a social worker be set up to consider each request for an abortion, Parliament in the Contraception, Sterilisation and Abortion Act 1977 has provided an alternative but similar procedure. Under the new procedure a woman seeking an abortion must have her case referred by her doctor to two certifying consultants. To establish a list of medical practitioners who will be certifying consultants (half the total number of such persons are to be practising obstetrician or gynaecologists) and to otherwise administer the new procedure under the Act an Abortion Supervisory Committee consisting of a Chairman (the first chairman is a Magistrate) and two medical practitioners has been established. There is an interesting point that in appointing certifying consultants the Supervisory Committee is to have regard to the desirability that their assessment of cases "will not be coloured by news in relation to abortion that are incompatible with the tenor" of the Act.

If the certifying consultants agree, a certificate authorising the abortion must be forwarded to the hospital where the operation is to take place. There is provision in the case where two certifying consultants disagree for a third such consultant's opinion to be sought.

An amendment to the Crimes Act 1961 passed at the same time as the Contraception, Sterilisation and Abortion Act gives for the first time statutory grounds to be applied in the case of a woman seeking an abortion. Hitherto it was an offence for a person to unlawfully procure a miscarriage, the word "unlawfully" being interpreted in the light of *R. v. Bourne* [1939] 1.K.B. 687.

The feature of the new Crimes Act provisions that has caused the greatest difficulty is the meaning to be ascribed to the words, forbidding the performance of an abortion if the danger to the women can be averted by other means. The Crimes Amendment Act 1977 defines "unlawfully" as follows—

- (1) The carrying out of an abortion is unlawful unless in the case of a pregnancy of not more than 20 weeks gestation, the person doing the act believes—

- (a) that the continuance of the pregnancy would result in serious danger (not being danger normally attendant upon childbirth) to the life, or to the physical or mental health, of the woman or girl, and that the danger cannot be averted by any other means; or
 - (b) that the pregnancy is the result of sexual intercourse between—
 - “(i) A parent and child; or
 - (ii) A brother and sister, whether of the whole blood or of the half blood; or
 - (iii) A grandparent and grandchild; or
 - (c) that the pregnancy is the result of sexual intercourse that constitutes an offence against section 131(1) of this Act; or
 - (d) that the woman or girl is severely subnormal within the meaning of section 138(2) of this Act.
- (2) The following matters, while not in themselves grounds for an abortion may be taken into account in determining whether the continuance of the pregnancy would result in serious danger to the woman’s life or to her physical or mental health—
- (a) the age of the woman or girl concerned is near the beginning or the end of the usual child-bearing years;
 - (b) the fact (where such is the case) that there are reasonable grounds for believing that the pregnancy is the result of rape.
- (3) In the case of a pregnancy of more than 20 weeks gestation, the person doing the act must believe that the miscarriage is necessary to save the life of the woman or girl or to prevent serious permanent injury to her physical or mental health.

The ground for abortion of foetal abnormality recommended by the Royal Commission was struck out of the bill during its Committee stages.

Safety of Children’s Night Clothes Act 1977 (No. 87 of 1977)

This Act makes provision for the prevention or reduction of the risk of death and personal injury through the use of certain approved fabrics and designs in the manufacture of children’s night clothes. Instructions and warnings require to be fixed to garments according to the class of material used. Penalties are provided for contraventions of the Act. Transitional exemption provisions are included.

Children and Young Persons Amendment Act 1977

Among amendments to the principal Act of 1974 is a redefinition of a child or young person “in need of care, protection, or control”, the protection of social workers and school teachers furnishing reports other than in bad faith or without reasonable care, and the giving of power to the court to direct in certain cases that psychiatric reports be obtained. Provision is also made for authorised social workers to arrange for psychiatric treatment, subject to the obtaining of specified consents.

Nurses Act 1977

The Act consolidates and amends the legislation providing for the training, registration and enrolment of nurses, the handling of complaints against nurses, and the establishment of the Nursing Council of New Zealand.

State Services Conditions of Employment Act 1977 (No. 95 of 1977)

This Act consolidates and amends the legislation enacted in 1969 regarding the remuneration and conditions of employment of State employees. For the public sector, provision is made for the criteria for prescribing conditions of employment; the issue of determinations; reviews of conditions of employment, the settlement of disputes as to the application of determinations; and the establishment, constitution and jurisdiction of the Public Sector Tribunal.

Separate provision is made for the establishment, composition, jurisdiction and procedure of single service tribunals (the Government Service Tribunal, the Government Railways Industrial Tribunal and the Hospital Service Tribunal). Other provisions govern Appeals to the Court of Appeal.

Special provisions control strikes and lockouts in certain essential services and export slaughter-houses. The essential services to which special procedures apply are set out below and are contained in a Schedule to the Act, which may be amended by Order in Council —

- (i) the production or supply of electricity;
- (ii) the working of any railway used for the public carriage of goods or passengers;
- (iii) the working of any transport service within the meaning of the Transport Act 1962;
- (iv) any service for the carriage of passengers or goods by water between the North Island the South Island or any service necessary for the operation of such a service;
- (v) any air transport service, being a service by aircraft for the public carriage of passengers or goods for hire or reward (but excluding an air topdressing service), or any service necessary for the operation of such an air transport service;
- (vi) the work of any fire brigade within the meaning of the Fire Service Act 1975 (but excluding the work performed by members of volunteer fire brigades);
- (vii) the operation of a hospital within the meaning of the Hospitals Act 1957 or of a psychiatric hospital within the meaning of the Mental Health Act 1969 or of any service necessary for the operation of such a hospital or psychiatric hospital;
- (viii) the operation of welfare institutions by the Department of Social Welfare;

- (ix) the operation of penal institutions by the Department of Justice.
- (x) meat inspection services associated with the slaughtering or supply of meat for domestic consumption.

Crimes Amendment Act 1978

The New Zealand Parliament has again been wrestling with the vexed question of abortion, despite its earlier hopes that last year's legislation had settled the matter.

Following the implementation of the Crimes Amendment Act 1977 [noted at (1978) 4 C.L.B. 239] considerable uncertainty was felt as to the meaning of s. 187A subsection (1)(a)—

- (1) The carrying out of an abortion is unlawful unless in the case of a pregnancy of not more than 20 weeks gestation, the person doing the act believes—
 - (a) that the continuance of the pregnancy would result in serious danger (not being danger normally attendant upon childbirth) to the life, or to the physical or mental health of the woman or girl, and that the danger cannot be averted by any other means.

Because of the uncertainty, which specifically related to the words "and that the danger cannot be averted by any other means", the Abortion Supervisory Committee which administers the provision of abortion in New Zealand, recommended that these words in question be deleted. This now leaves the law as it was recommended by the Royal Commission on Contraception, Sterilisation and Abortion.

The Crimes Amendment Act 1978 also makes foetal abnormality a ground for an abortion. That, too, had been recommended by the Royal Commission, but a provision to that effect in the Contraception, Sterilisation and Abortion Bill 1977 was struck out by Parliament. The Crimes Amendment Act 1978 now reverses that position.

Massage Parlours Act 1978

Responding to what was seen as an increasing tendency for organised crime to use so called "massage parlours" as a front for prostitution and as a source of income to finance criminal ventures, including drug dealing, the New Zealand Parliament enacted the Massage Parlours Act.

The Act is designed to control the activities of parlours in two ways—

- (i) no person can operate a massage parlour without a licence issued by a Magistrate. In deciding whether a licence will be issued the Magistrate must hear any objections from the police, or members of the public. All managers of massage parlours must also be approved by a Magistrate. No person who has had, within ten years of the date of applying for a licence, any

conviction for a drugs or prostitution offence is eligible to obtain a licence or manager's certificate;

- (ii) when the premises are licensed as a massage parlour the police may inspect the premises at any time. It is an offence for a proprietor to refuse entry to a member of the police. If a police believe that an offence against the Massage Parlours Act is being committed on licensed premises they may be issued with a warrant to enter those premises.

The police are also given the right to make a complaint to a Magistrate about the operation of a parlour with a view to the licence being cancelled. Among the grounds for complaint are— convictions for drug or prostitution offending, and a finding by the Magistrate that acts of prostitution had occurred due to a licensee's failure to effectively supervise his business.

The Massage Parlours Act is to come into force on 1 April 1979.

New Zealand Council for Postgraduate Medical Education 1978

The Act establishes the Council, which is to advise the Minister on national and regional needs in respect of the organisation and financing of postgraduate medical education; is to initiate, co-ordinate and support schemes for such education; collect and disseminate relevant information; liaise with teaching institutions; and initiate, co-ordinate and support research into the evaluation of programmes for postgraduate education.

Misuse of Drugs Amendment Act 1978

This measure enacts the recommendations of a special government caucus committee that was established to seek methods of combating the increasing incidence of offending involving "hard drugs" (those scheduled under the Misuse of Drugs Act 1975 as Class A and B controlled drugs). The amendment deals only with those categories of drugs.

The major changes to the law include an increase in the maximum penalty for dealing in Class A drugs from 14 years imprisonment to life imprisonment and, in the case of Class B drugs, from ten years to 14 years imprisonment.

A specific offence of conspiracy to deal in drugs has been included in the amendment. Previously the general provisions relating to conspiracy in the Crimes Act 1961 were used for such cases, and provided a maximum penalty of seven years' imprisonment. Under the Misuse of Drugs Amendment Act this offence is now punishable by a maximum penalty of 14 years imprisonment in the case of Class A drugs and ten years imprisonment in the case of Class B drugs.

The amendment Act also makes provision for a judge, on the application of a commissioned officer of the Police, to issue a

warrant authorising the interception of private communications by means of a listening device or telephone tap. The warrant may be issued when the judge is satisfied that other detection methods will be or have been successful. It authorises an interception for a maximum of 30 days although it may be renewed. There is provision for an emergency authorisation to be issued by a judge on an oral application. Such an authorisation must later be validated by the formal procedure provided. Only evidence of drug offending gained from the listening device is admissible in evidence. There is provision for the defence to see the police affidavits filed in support of an application for an interception warrant where a judge is satisfied that such disclosure will not unduly prejudice the police interests.

Bail is also affected where an accused is charged with a Class A or B drug dealing offence. In these cases, an accused person cannot be granted bail except by a Judge of the Supreme Court and either the accused or the Crown may appeal to the Court of Appeal against the Judge's decision.

Provision is also made for a judge, on the conviction of a person charged with a drug dealing offence, to order that the offender should pay a fine both for that offence, and also in respect of previous offending that the judge is satisfied has occurred. Fines enforcement procedures are tightened to ensure that there is an effective mechanism to enforce any such fine.

Dietitians Amendment Act 1979 (No. 44 of 1979)

This Act amends the principal Act of 1950 and makes new provision for the composition and procedure of the Dietitians Board, and widens its functions.

Provision is also made for the establishment of a committee of the Board (to be known as the Penal Cases Committee) with power to investigate complaints and refer them to the Board for further inquiry. The disciplinary powers of the Board are laid down and its procedure prescribed.

Appeals against decisions of the Board are to be heard by the Administrative Division of the Supreme Court.

Health Amendment Act 1979

The Act, inter alia, adds a new Part IIIA, which prohibits unauthorised trading in "human blood", an expression defined as including "any human organ or human tissue, including the placenta, of a kind that is suitable as a source from which to derive a constituent of blood for therapeutic use or for the preparation of a substance for therapeutic use."

Toxic Substances Act 1979 (No. 27 of 1979)

This Act makes new provision for the control of toxic substances, and consolidates (with amendments) the Poisons Act 1960, as amended. A Toxic Substances Board is established whose principal function is to advise the Minister or the Director-General of Health on matters relating to—

- (a) the manufacture, importation, exportation, sale, supply, storage, use, disposal, carriage, packaging, labelling, advertising, destruction, or accidental spillage of toxic substances,
- (b) the protection of human health from the harmful effects of toxic substances,
- (c) the protection of the environment from any such harmful effects.

Provision is made for controlling the sale, packing, custody and advertising of poisons; for the granting, effect, duration and display of licenses required under the Act; and for the enforcement of the Act's provisions.

The Act also provides for appeals to the Supreme Court against decisions of the Medical Officer of Health in relation to the licensing provisions of the Act on the grounds that any relevant requirement of the Act (or of regulations made under the Act) has not been complied with, or that the Medical Officer of Health, in reaching his decision, acted unreasonably. In certain circumstances, a further appeal lies to the Court of Appeal.

Disabled Persons Community Welfare Amendment Act 1979 (No. 84 of 1979)

This Act amends the principal Act of 1975 to allow grants and loans to be made to disabled persons for the purchase of motor vehicles or other mechanical means of transport (or for the alteration of their mechanism) as may be necessary to enable a disabled person to undergo training for, or to obtain or retain employment, which will enable him to achieve a substantial measure of financial independence.

The Act also contains guidelines for the exercise of the Director-General's discretion.

Misuse of Drugs Amendment (No. 2) Act 1979 (No. 132 of 1979)

This Act amends the principal Act of 1975 by making provision to regulate internal searches of persons under arrest on suspicion of having committed certain specific offences under the principal Act.

Papua New Guinea

Baby Feed Supplies (Control) Act 1977

The Act restricts the right of freedom of expression conferred by s. 46 of the Constitution in order to protect baby health from the consequences of the unhygienic, insufficient or wrong use of certain items connected with the feeding of babies. (e.g. feeding bottles, teats, dummies, and the purchase or use of milk or other products in connection with them).

Under the Act it is an offence to publish an advertisement whose intention or likely effect is to encourage the bottle feeding of babies or the purchase or use of prescribed articles or the purchase or use of milk or other products in connection with the use of prescribed articles. However a pharmacist may display within his pharmacy an advertisement which may otherwise be prescribed to an extent necessary to enable persons obtaining prescribed articles in accordance with an authorization given under the Act, to choose those articles. Suppliers may also use advertisements in the course of their business but only display to pharmacists, nurses, or persons empowered by the Act to give authorizations.

Authorization to obtain a prescribed article is only to be given where it would be in the interests of the baby or infant to be fed or soothed by the prescribed article, and at the time the authorization is given instructions as to the article's proper use are also to be given.

The International Planned Parenthood Federation notes that this legislation is the first of its kind to have been received at its London Headquarters.

St. Lucia

Public Health Regulations

The following Regulations have been made under the Public Health Act 1975—

- (i) Public Health (Nuisances) Regulations 1978
(S. R. & O. 1978, No. 10)
- (ii) Public Health (Offensive Trades) Regulations 1978
(S. R. & O. 1978, No. 11)
- (iii) Public Health (Communicable and Notifiable Diseases) Regulations 1978
(S. R. & O. 1978, No. 12)
- (iv) Public Health (Barber) Regulations 1978
(S. R. & O. 1978, No. 13)
- (v) Public Health (Water Quality Control) Regulations 1978
(S. R. & O. 1978, No. 14)
- (vi) Public Health (Apartment Houses, Guest Houses and Hotels) Regulations 1978
(S. R. & O. 1978, No. 15)
- (vii) Public Health (Swimming Pools) Regulations 1975
(S. R. & O. 1978, No. 16)

- (viii) Public Health (Notification of Births) Regulations 1978
(S. R. & O. 1978, No. 17)
- (ix) Public Health (Bakeries) Regulations 1978
(S. R. & O. 1978, No. 18)
- (x) Public Health (Transportation of Human Remains)
Regulations 1978
(S. R. & O. 1978, No. 19)
- (xi) Public Health (Barracks and Tenements) Regulations 1978
(S. R. & O. 1978, No. 20)
- (xii) Public Health (Disposal of Offensive Matter) Regulations 1978
(S. R. & O. 1978, No. 21)
- (xiii) Public Health (Sewage and Disposal of Sewage and Industrial
Waste Works) Regulations 1978
(S. R. & O. 1978, No. 22)

Labour Bill 1980

This is a very comprehensive Bill dealing with all aspects of industrial relations. Its long title describes its purpose as being—

to improve the security of employment of employees; to reassert the right of free association of employees and employers and the right to take industrial action; to encourage the growth of responsible trade unions and the development of collective bargaining by making provision for the regulated recognition of trade unions by employers; to set new and improved standards of occupational health and safety; generally to modernise, co-ordinate and harmonise the labour laws of the State; to ensure that the labour laws of the State comply with its international obligations; to establish a judicial tribunal to decide disputes and other matters arising out of this Act; and to establish formal methods of consultation to assist the Minister in the carrying out of his duties.

The Bill seeks to repeal all the existing legislation relating to industrial relations. Its 424 sections are classified as follows—

- (i) *Preliminary* (including definitions of such terms as “absenteeism”, “bargaining in good faith”, “continuous employment”, “fixed term contract”, “immediate family”, “irregular industrial action short of a strike”, “lockout”, and “temporary cessation of work”) In this part, the right of an employee to join the trade union of his choice or not to join a trade union as well as the right to resort to industrial action are recognised.
- (ii) *The Labour Department* This part contains the administrative arrangements within the department as well as provision for a Labour Advisory Board, a Wages Committee and a Tribunal.
- (iii) *Terms of employment* Included here are reasons for dismissal which are “fair”, distinguished from those which are “unfair”.
- (iv) *Employment of women, young persons and special provisions for the employment of domestic servants and shop assistants*
- (v) *Work permits*
- (vi) *Control of wages*, including duty to pay the minimum wage and particulars relating to the payment of wages.
- (vii) *Health and security*

- (viii) *Training and manpower development* This part provides for the establishment of a Training and Manpower Development Commission.
- (ix) *Trade Unions and Employers' Associations*
- (x) *Settlement of trade disputes*
- (xi) *Recruitment*
- (xii) *Offences, penalties and legal proceedings*

The Schedule contains a Code of Industrial Relations Practice which is designed to give practical guidance for promoting good industrial relations. While the Code imposes no legal obligations, its provisions may be taken into account in proceedings before any court. It deals exhaustively with responsibilities, employment policies, conditions and consultations, recognition of Trade Unions, collective bargaining, employee representation at the place of work, grievance and dispute procedures and disciplinary procedures.

Among other material in the Schedule are the Rules of the Tribunal, Rules for the conduct of a ballot under the Labour Act, occupations in which women, young persons and children may not be employed, and notifiable occupational diseases.

St. Vincent

Arrowroot Industry Act 1976 (Act No. 20 of 1976)

The Act establishes the Arrowroot Industry Association to encourage the industry, to supervise production and processing, and to control export marketing.

Public Health Act 1977 (No. 9 of 1977)

The purpose of this Act is to secure and maintain public health, mainly by the prevention and suppression of communicable diseases, by ensuring treatment of persons suffering from venereal diseases, by providing hospitals for lepers, and by the construction and regulation of buildings used for the storage of foodstuffs.

The Act also provides for the constitution of a Central Board of Health, having the Medical Officer of Health as the Chief Executive Officer, and a Public Health Department, under the control of the Medical Officer of Health.

Evidence (Amendment) Act 1977 (No. 31 of 1977)

The Act makes new provision for the admission in evidence of the certificate of the Government chemist, in the following terms—

7. (1) In criminal proceedings the certificate of a Government chemist purporting to be signed by him is admissible as prima facie evidence of the matters stated therein if it is proved by other evidence that the seals or other fastenings of the container of the substance or thing analysed and in respect of which the certificate was given were intact at the time the container was delivered to him.

(2) When a certificate of a Government chemist is used in criminal proceedings the judge or magistrate may, if he thinks fit, require the

attendance of the Government chemist and examine him as to the subject-matter thereof.

(3) In criminal proceedings either of the parties may require the attendance of a Government chemist to give evidence and in that case the costs of his attendance shall, unless the judge or magistrate otherwise orders, be payable by the party so requiring.

(4) In criminal proceedings a court may presume that the signature to a certificate of a Government chemist is genuine and that the person who signed it held the office and qualifications which he professed to hold at the time when he signed it.

Central Water and Sewerage Authority Act 1978 (No. 6 of 1978)

This Act repeals the Central Water Authority Ordinance 1969 and establishes the Central Water and Sewerage Authority with power to formulate proposals for meeting water supply or sewerage disposal requirements and to levy and collect rates and charges for water supplied and for other services provided by the Authority.

Nurses, Midwives and Nursing Assistants Act 1978 (No. 11 of 1978)

This Act consolidates and amends the law relating to the registration of Nurses and Midwives and provides for enrolment of Nursing Assistants.

The Act also provides for the establishment of a General Nursing Council having responsibility for the education, qualification, practice and conduct of Nurses, Midwives and Nursing Assistants.

Professions Licensing Act 1979 (No. 8 of 1979)

This Act makes provision for the levy and collection of licence fees from members of the professions listed in the Schedule. Included among the 24 professions liable to a licence fee are Barristers and Solicitors, Medical and Dental Practitioners, Veterinary Surgeons, Electrical and Civil Engineers, Architects, Chartered Accountants, and Insurance Brokers and Agents.

Singapore

Infectious Diseases Act 1976

This Act replaces the Diphtheria Immunisation Act (Cap. 153), the Leprosy Act (Cap. 159) and the Quarantine and Prevention of Disease Act (Cap. 166) with a new, comprehensive and up-to-date framework for dealing with quarantine and the prevention of infectious diseases in Singapore. The Act also gives formal recognition to the separate responsibilities of the Ministry of Health and the Ministry of the Environment in the administration of this branch of the law, and confers wider powers on the authorities for more efficient administration.

Misuse of Drugs (Amendment) Act 1977

This Act, inter alia, empowers the Director of the Central Narcotics Bureau to make an order requiring a drug addict or a person whose urine has been found to be positive as a result of a urine test to be admitted to an approved institution to undergo treatment and rehabilitation. A person so admitted will be detained therein for a period of six months unless earlier discharged by the Director or a Review Committee of the institution.

The Review Committee of an approved institution has the power to extend the period of detention of an inmate for a further period not exceeding six months at any one time; but no inmate who has been admitted pursuant to an order of the Director may be detained for more than two years after his admission to an approved institution.

The Review Committee of an approved institution is required to keep the case of every inmate under review and to consider as often as practicable whether he should be discharged.

Swaziland

Medical and Dental Practitioners Act 1970 (No. 3 of 1970)

Legal Notice No. 85 of 1977 adds to the number of Medical and Dental Councils recognised by the Swaziland Council for purposes of registration as medical practitioners or dentists, corresponding Councils in Ghana, Israel, Kenya, Nigeria, Tanzania, West Germany and Zambia.

Control of Natural Therapeutic Practitioners Regulations 1978

These Regulations relate to the registration and control of "natural therapeutic practitioners" who are defined as persons who practice as chiropractors, homeopaths, naturopaths or electropaths. The Registration and Control of Para-Medical Practitioners' Regulations 1972 are applied mutatus mutandis. Para-medical practitioners, as opposed to natural therapeutic practitioners, are persons entitled to practice any of the following occupations as set out in the Swaziland Medical and Dental Practitioners Act 1970, namely, chiropodists, diagnostic radiographers, dietitians, food inspectors, health inspectors, medical technologists, anaesthetic assistants, occupational therapists, optometrists, orthopaedic mechanics, surgical appliance makers, physiotherapists and dental mechanics. It is specially provided that a person practising as a natural therapeutic practitioner shall not —

- (a) practise midwifery;
- (b) perform any surgical operation or administer any injection to any person;
- (c) withdraw blood from any person;

- (d) treat or offer to treat cancer or prescribe a remedy for cancer or claim that any article, apparatus or substance will or may be of value for the alleviation of the effects of the curing or treatment of cancer;
- (e) perform any internal examination on any person;
- (f) claim or by any means whatsoever hold himself out, to be a medical practitioner or use the name medical practitioner, or doctor or any other name, title, description, or symbol indicating or calculated to lead persons to infer that he possesses any qualifications of a medical practitioner; or
- (g) prevent any person from being treated by, or improperly influence any person to abstain from treatment by a person registered in terms of the Act.

No prosecution for a contravention of these regulations can be brought without the prior written consent of the Attorney-General.

Tanzania

National Institute for Medical Research Act 1979 (No. 23 of 1979)

This Act is one of many that were passed to fill the vacuum created by the breakdown of the East African Community. The Act establishes an Institute for Medical Research and among its main functions are, to take over and continue the business and activities of medical research centres in Tanzania which were formerly run under the auspices of the defunct East African Community; in co-operation with the government or other persons to promote or provide training facilities for local personnel for medical research and to monitor, control and, co-ordinate medical research carried out within Tanzania or elsewhere and to evaluate the findings of that research.

Trinidad and Tobago

St. John Ambulance Association and Brigade of Trinidad and Tobago (Incorporation) Bill

The Bill seeks to give corporate status to the above voluntary and charitable organization, especially as its establishment and continuance is still dependent upon the statutes of the Order of the Grand Priory of the Most Venerable Order of the Hospital of St. John of Jerusalem in the United Kingdom. With incorporation the organization would become a separate and distinct legal entity though at the same time it will adhere to the traditions and principles of the Order as embodied in its motto "Pro Fide, Pro Utilitate Hominum".

Disaster Measures Act 1978

This Act provides for the taking of effective measures to cope with disasters. It seeks to empower the President to declare by Proclamation published in the Gazette a disaster area where any area is affected by calamity such as any fire, flood, landslide, hurricane, disease or other calamity.

The Act provides that for so long as the area is a disaster area the President or someone duly authorised by him may take such measures and exercise such powers as may be considered necessary to mitigate the effects of the disaster. Such measures include—

- (a) assuming control of and regulating—
 - (i) all means of communication and transport,
 - (ii) all supplies of food and other necessities,
 - (iii) all water, fuel and power installation;
- (b) entering into and taking possession of any building for the purpose whatsoever including the demolition of that building;
- (c) prohibiting or restricting the possession or use by any person of any specified articles or commodities;
- (d) imposing restrictions on persons leaving or entering the disaster area.

Dental Profession Bill 1980

This Bill seeks to regulate the practice of dentistry by the establishment of a Dental Board with provision for the election of a Council of the Board exercising executive functions on its behalf. The Bill makes provision for the registration of dentists and the emolument of dental auxiliaries. In addition there is provision for the establishment of a Register of Dentists, and Rolls for dental auxiliaries. The Bill would make it an offence, inter alia, to hold out as a dentist or dental auxiliary or practise as a dentist or dental auxiliary, while not being registered or enrolled, as the case may be.

There are also miscellaneous provisions dealing with appeals to a Judge in Chambers by a person aggrieved by the refusal of the Council to register or enroll him, as the case may be, or who has been suspended from practising or whose name has been removed from the Register or Roll.

United Kingdom Congenital Disabilities (Civil Liability) Act 1976

The Act provides for civil liability in the case of children born disabled as a result of some person's fault. It also extends the Nuclear Installations Act 1965, so that children born disabled in consequence of a breach of duty under that Act may claim compensation.

Criminal Law Act 1977

The Act implements the Report of the Law Commission (for England and Wales) on Conspiracy and Criminal Law Reform, (Law Com. No. 76) and some of the principal recommendations of the James Committee on the distribution of criminal business; and modifies the criminal law and procedure in a number of areas, including—

- (vii) *definition of "cannabis"*: the Act amends the definition of "cannabis" in the Misuse of Drugs Act 1971 to include all parts of any plant of the genus *Cannabis* other than cannabis resin (already separately defined), the mature stalk, the fibre produced from mature stalk and the seed, after separation from the plant. [This amendment was necessitated by the decisions of the Court of Appeal in *Reg. v. Goodchild* [1977] 1 W.L.R. 473 and *Reg. v. Mitchell* [1977] 1 W.L.R. 753.];
- (viii) *incest*: the Act makes it an offence for a man to incite a girl under the age of 16 (whom he knows to be his grand-daughter, daughter or sister) to have sexual intercourse with him. The relationship does not have to be traced through lawful wedlock;

Medical Act 1978

This Act provides for the constitution and functions of the General Medical Council, branch councils and committees; and amends certain enactments relating to medical education, the registration of medical practitioners and their professional conduct and fitness to practice.

In the Part of the Act which deals with the registration of practitioners qualified overseas, a Review Board is established with jurisdiction to give advisory opinions on decisions made by the General Council which fall into prescribed categories. The Review Board's opinion is then transmitted to the President of the General Council, or to a Council member appointed for this purpose, who may, if having regard to the Board's opinion he thinks fit, direct that the decision which was subject of review be reversed.

One of the Schedules to the Act sets out the procedure to be followed by the Professional Conduct Committee and the Health Committee, with power for the General Council to make rules for the purposes of proceedings before such Committees.

National Health Service (Scotland) Act 1978

This Act consolidates a number of enactments relating to the health service in Scotland.

Vaccine Damage Payments Act 1979 (c. 17)

This Act makes provision for payments to be made out of public funds in cases where severe disablement occurs as a result of vaccination against certain diseases or of contact with a person who has been vaccinated against any of those diseases; and makes provision in connection with similar payments made before the passing of the Act.

The diseases to which the Act applies are –

- (a) diphtheria,
- (b) tetanus,
- (c) whooping cough,
- (d) poliomyelitis,
- (e) measles,
- (f) rubella,
- (g) tuberculosis,
- (h) smallpox, and
- (i) any other disease specified by the Secretary of State for the purposes of the Act by statutory order.

The Act gives power to the Secretary of State, in accordance with the provisions of the Act, to make payment of £10,000 to or for the benefit of a person, (or to his personal representative) if he is satisfied that the applicable conditions of entitlement set out in the Act are fulfilled, and that the person concerned is (or was immediately before his death) severely disabled as a result of vaccination against one of the specified diseases.

The Act also make provision regarding the manner in which claims are to be determined; the review by independent medical tribunals (to be established by regulation) of the extent of disablement and causation; the reconsideration of determinations; the manner in which ex gratia payments, or claims, made before the passing of the Act are to be treated; and financial matters.

The Act also applies to a person who is severely disabled as a result of a vaccination given to his mother before he was born as if the vaccination had been given directly to him.

Pneumoconiosis etc. (Workers' Compensation) Act 1979 (c. 41)

This Act makes provision to enable the Secretary of State to make lump sum payments to persons who are disabled by pneumoconiosis, byssionosis or diffuse mesothelioma, or where applicable, to the dependants of persons who were, immediately before they died, disabled by one of those diseases.

The amounts to be paid are to be prescribed by regulations, which may specify different amounts for different cases or classes of cases or for different circumstances.

The Act also sets out the conditions of entitlement; who are dependants for the purposes of the Act; the manner in which claims

are to be determined or may be reconsidered; and provides for other related matters.

Nurses, Midwives and Health Visitors Act 1979 (c. 36)

This Act [the Bill was briefly noted at (1979) 5 C.L.B. 48] establishes a Central Council for Nursing as a corporate body, and National Boards for England, Wales, Scotland and Northern Ireland. The principal functions of the Central Council are to establish and improve standards of training and professional conduct for nurses, midwives and health visitors, and in the discharge of its functions the Council is required to have proper regard for the interests of all groups within the professions, including those with minority representation. The Council must ensure that the standards of training they establish meet any Community obligation of the United Kingdom. The Council is also required, by means of rules, to determine the conditions of a person's being admitted to training, and the kind and standard of training to be undertaken, with a view to registration, and such rules may also make provision with respect to the kind and standard of further training available to persons who are already registered. The powers of the Council include that of providing advice for nurses, midwives and health visitors on standards of professional conduct.

The Secretary of State is required to constitute as standing committees of the Council, a Midwifery Committee and a Finance Committee, and he may constitute other standing committees of the Council and (to the extent prescribed by the order) require the Council to consult them on, or empower them to discharge functions of the Council with respect to, other matters including in particular—

- (a) training,
- (b) clinical nursing studies,
- (c) mental nursing, and
- (d) occupational health nursing.

The National Boards have the following functions—

- (a) to provide, or arrange for others to provide, at institutions approved by the Board—
 - (i) courses of training with a view to enabling persons to qualify for registration as nurses, midwives or health visitors or for the recording of additional qualifications in the register, and
 - (ii) courses of further training for those already registered;
- (b) to ensure that such courses meet the requirements of the Central Council as to their content and standard;
- (c) to hold, or arrange for others to hold, such examinations as are necessary to enable persons to satisfy requirements for registration or to obtain additional qualifications;
- (d) to collaborate with the Council in the promotion of improved training methods; and

(e) to carry out investigations of cases of alleged misconduct, with a view to proceedings before the Central Council or a committee of the Council for a person to be removed from the register.

The National Boards must discharge their functions subject to and in accordance with any applicable rules of the Council and must have proper regard for the interests of all groups within the profession, including those with minority representation.

Other provisions of the Act relate to the preparation and maintenance of the professional register; admission to, removal from and restoration to, the register; miscellaneous provisions about mid-wifery; and financial provisions.

An appeal by a person aggrieved by a decision to remove him from the register (or to remove or alter any relevant entry) lies to the High Court, the Court of Session or the High Court in Northern Ireland, depending on the appellant's ordinary place of residence.

Hypnotism (No. 2) Bill

The purpose of this Bill is to control demonstrations of hypnotism at clubs, and to prohibit advertisements and records relating to hypnotism. The Bill would extend to clubs the provisions of the Hypnotism Act 1952 which at present prohibit exhibitions, demonstrations or performances of hypnotism on persons at entertainments to which the public are admitted unless authorised under s. 2 of that Act. Authorisations may be subject to conditions and are granted by a local authority. It also would increase the maximum fines which can be imposed for offences under that Act.

The Bill also prohibits taking part in –

- (a) the publication of any advertisement relating to hypnotism or in respect of any person as a hypnotist, or
- (b) the issue to the public of any record capable of inducing hypnotism.

It would be a defence for the accused to prove that he is a person whose business it is to publish or arrange for the publication of advertisements (or to issue or arrange for the issue of records) and that he received the advertisement or record in question for publication or issue in the ordinary course of business and did not know, and had no reason to suspect, that its publication or issue would amount to an offence.

Pneumoconiosis etc. (Workers' Compensation) (Determination of Claims) Regulations 1979 (S.I. 1979 No. 727)

These Regulations, made under the Act noted at (1979) 5 C.L.B. 636, prescribe the manner in which claims for payment are to be made for determination by the Secretary of State. Provisions are also made for applications for reconsideration of such determinations.

Tribunals and Inquiries (Vaccine Damage Tribunals) Order 1979 (S.I. 1979 No. 659)

These Regulations place under the supervision of the Council on Tribunals, the tribunals constituted under the Vaccine Damage Payments Act 1979, noted at (1979) 5 C.L.B. 635. Provision is also made for the selection of the Chairmen of such tribunals.

Laboratory Animals Protection Bill

The Bill seeks to replace the Cruelty to Animals Act 1876 and make new provisions for the protection of laboratory animals.

Clause 1 prohibits the performance on living animals of any procedure (defined to include experimental and testing procedures and those used in the production of vaccines, sera etc.) which may cause the animal distress, pain or ill-health, except subject to the restrictions imposed by the Act.

Clause 2 states the conditions under which procedures may be carried out and provides for special restrictions, by means of specific licence conditions made by the Home Office (referred to as the Secretary of State) on procedures liable to cause pain and those carried out for special purposes. Inter alia, it prohibits the making of visual recordings (films etc.) when the purpose is only to make the recording. Paragraph (h) requires animals subjected to painful procedures to be killed at the end of the procedure, or during the procedure if the pain is severe or enduring. It also protects the offspring of such animals.

Clause 3 confers power on the Secretary of State to amend the range of species protected by the Act, which are mentioned in a Schedule.

Procedures are introduced for the licensing of premises and places (which could for example be a particular field on a farm) and prohibits the performance of procedures except on licensed premises or places. Also prohibited is the performance of procedures except under licence save that unlicensed students are enabled to carry out procedures on unconscious animals under the close supervision of a full licence holder who must ensure that the animals do not regain consciousness. A system for the application and issue of licences is set out which replaces the present system involving various types of certificate and provide for the issue of a basic licence to carry out procedures in which the animal is fully anaesthetised and is killed before retaining consciousness and also for endorsements to be added, laying down special conditions such as the species of animals to be used and the definition of the procedures permitted, when such procedures may cause the animals pain. The system also provides for the sponsorship of applications for licenses by two sponsors, one of whom has charge and knowledge of the applicant and the laboratory, and the other of whom is an independent professor of a

biological science whose name is on a register kept by the Secretary of State and compiled from names recommended to him by any of the persons listed in a Schedule.

The issue of probationer licences is provided for, permitting procedures to be carried out only under the supervision of a full licensee; and for all first licences to be subject to this restriction.

The Secretary of State is required to publish a Guide to Good Laboratory Animal Practice covering the management and use of laboratory animals, including advice on the use of alternative methods. This will enable guidance to be given on standards of excellence without making them necessarily mandatory.

The appointment of inspectors is provided for and their duties defined. They will have a right of access to licensed premises to carry out their duties and power to order the killing of any animal they consider to be suffering unduly, and in the event of dispute it gives the inspectors an absolute power of decision.

The Secretary of State is also required to publish an annual report on all procedures carried out, analysed by purpose of procedures and species of animals used, and giving a statement of recorded infringements.

Transplant of Human Organs Bill 1979

This private member's Bill seeks to allow hospitals to take organs from a patient once clinical death has been established unless he has previously registered his dissent.

The Bill has the following features—

- (i) a registered medical practitioner would be able, at the request of another such practitioner, to authorise the removal and use for therapeutic or curative purposes of any part of the body of a person who has died while under his care, unless he has before his death registered his objection to the use of his body, or part of his body, for such purposes;
- (ii) no authorisation could be given, and no removal effected until the death has been certified by two registered medical practitioners, neither of whom can be the practitioner requesting the removal, and one of whom must be of not less than five years' standing;
- (iii) a certification of death under these provisions must be accompanied by notes recording the observations of the practitioners at the time of the death and the clinical action taken immediately to, before and after death. Both the certificate and the notes must be made available, if required, to a coroner;
- (iv) the removal of a part of a body must only be effected by a registered medical practitioner;

- (v) if there is reason to believe that an inquest or a post-mortem may be required, the practitioners need the consent of the coroner;
- (vi) registration of objections would be effected by the Secretary of State. Objection may be notified by a person only in respect of his own body (or any specified part) and in the case of a person under 16, by his parent or guardian. A notification can be varied or revoked by a subsequent notification;
- (vii) the Secretary of State would have power to make regulations prescribing the form in which notification of objections is to be made, and to make any other provision he deems necessary for the proper performance of his functions. Regulations would be subject to annulment by a resolution of either House of Parliament;
- (viii) the Secretary of State would be required to ensure that information contained in the register is recorded on a computer and is available at all times for immediate transmission on request to registered medical practitioners.

Note: The Report of a Government working party aimed at giving guidance to all concerned with transplants, and at reducing public anxiety by eliminating uncertainty, is expected shortly. The working party was under the chairmanship of Lord Smith of Marlow, a former President of the Royal College of Surgeons.

Residential Homes Act 1980 (c.7)

This Act consolidates certain enactments relating to the registration, inspection and conduct of residential homes for disabled, old or mentally disordered persons and to the provision, by district councils, of meals and recreation for the aged.

Judicial Decisions

Australia

Homicide — acting in concert — one pleads defence of insanity — whether nature of sanity amounts to concert?

The High Court of Australia has had occasion to consider whether, on a charge of murder, a person can be found guilty of acting in concert with another person who was insane at the time of the commission of the offence.

The High Court held —

- (i) where two accused were charged with acting in concert and one pleaded the defence of insanity, the jury, if it found insanity proved, should be told by the trial judge to consider whether the nature of the insanity was such as to make it impossible for there to be any concert between the two accused; and
- (ii) if one of the accused did not understand the nature and quality of his act, there would be no concert, but if he only did not know that what he had done was wrong, the jury could find that the two accused had acted in concert if they were satisfied that there was actual agreement.

In so holding, the High Court applied the House of Lord's decision in *Murdoch v. Taylor* [1965] 1 All E.R. 406, and considered the decisions in *R. v. Lowery and King* (No. 2) [1972] V.R. 560, *R. v. Tyler and Price* (1838) 8 C. & P. 616, *R. v. Bourne* (1952) 36 Cr. App. R. 125 and *R. v. Cogan* [1975] 3 W.L.R. 316. The Court also examined the rules relating to the admissibility of evidence relating to prior convictions and the nature of the trial judge's discretion to admit or reject such evidence, and, in so doing, examined the decisions relating to the operation of the English Criminal Evidence Act 1898, including *Maxwell v. D.P.P.* [1973] A.C. 309, *R. v. Stannard* [1965] 2 Q.B. 1 and *Murdoch v. Taylor* (above).

Matusevich v. R. (1977) 15 A.L.R. 117.

Australia— A.C.T.

Sentencing—mentally retarded offender

The accused pleaded guilty in the Supreme Court of the Australian Capital Territory to the indecent assault of a child. The accused, who was mentally retarded, had had a very poor family and home background, and had spent a number of years in psychiatric hospitals. In addition, he had a number of previous convictions, including convictions for sexual offences.

In sentencing the accused, the Supreme Court had occasion to review the rules of sentencing and, in so doing, held that—

- (i) in sentencing the accused and in applying the ordinary principles of punishment of criminals, the retributive element ought to receive less weight than it might with other crimes and in other circumstances; and
- (ii) an order should be made, by which the accused would be released upon his giving security that he would be of good behaviour for eight years including that he would during that period abstain from alcohol and would not go to hotels and other places where it is available: would enter a psychiatric hospital as a voluntary patient: would for the period reside at that hospital and accept the direction and guidance of its Medical Superintendent: in the event that the Medical Superintendent should from time to time arrange accommodation in a half-way house outside the hospital, during the period would, if directed, reside in that house as directed and observe such rules and directions as the Medical Superintendent or the person in charge laid down, and if or when so directed during the period, return to reside in the hospital: would during the period, at such times or places as specified by the Medical Superintendent, submit to examination and psychiatric treatment by or on direction of or recommendation of the Medical Superintendent or his nominee: would, during the period, engage only in such employment as might be arranged or approved by the Medical Superintendent: and would not, during the period, enter the grounds of any school or loiter in the neighbourhood of any school.

R. v. Riley (1979) 22 A.C.T.R. 1.

Illegal possession and use of dangerous drugs—whether joint occupier of premises in “possession”

The appellant appealed to the Supreme Court of the Australian Capital Territory against his conviction on a charge of illegal possession and use of a dangerous drug, contrary to the provisions of s. 35 of the Poisons and Dangerous Drug Ordinance 1933 (A.C.T.) and ss. 4(1) and 5 of the Public Health (Prohibited Drugs) Ordinance 1957 (A.C.T.).

At the hearing before the Stipendiary magistrate the question arose whether the appellant, who was a joint occupier with another person of the premises in which the drugs were found, was, in fact, in “possession” of the drugs. The appellant was not the owner of the premises, but had a right to occupy them from a relation.

The Supreme Court, in dismissing the appellant’s appeal and confirming his convictions, held, *inter alia*, that—

- (i) the concept of “possession” in s. 35 of the Poisons and Dangerous Drugs Ordinance 1933 (A.C.T.) and s. 4(1) of the Public Health (Prohibited Drugs) Ordinance 1957 (A.C.T.) was more than satisfied by a finding that, at the relevant time, the appellant had the exclusive right to possession and de facto control of the premises in which the drug was found;
- (ii) it was therefore unnecessary for the Court to attempt to categorise any right of possession of the premises in terms of a tenancy or licence because either right would carry with it the character of exclusivity; and
- (iii) even if another person did share equally in joint legal possession of the premises with the appellant, this fact would not have reduced relevantly the appellant’s possession of the drug or the liabilities it might have attracted.

In so holding, the Supreme Court considered a number of Australian and English decisions on the illegal possession of drugs and, in so doing, distinguished *Warner v. Metropolitan Police Commissioner* [1969] 2 A.C. 256 and *Williams v. R.* (1978) 22 A.L.R. 19 but either followed or applied *Radaich v. Smith* (1959) 101 C.L.R. 209, *Shell-Max and B.P. Ltd. v. Manchester Garages Ltd.* [1971] 1 All E.R. 841, *R. v. Bush* (1975) 1 N.S.W.L.R. 298 and *R. v. Rawcliffe* (1977) 1 N.S.W.L.R. 219.

See v. Milner (1979) 25 A.C.T.R. 21.

Australia— New South Wales

Nervous shock—neurosis from feelings of guilt

The New South Wales Court of Appeal has held that—

- (i) in deciding whether a particular injury was of a kind which was foreseeable it was necessary to draw a line between the broadest of categories, on the one hand, which would introduce liability for direct consequences and the narrowest, on the other, which would promote uncertainty and provide distinctions of a disreputable nicety, and, in doing that, it was necessary to remember that the purpose was to set a limit to the consequences for which a negligent defendant ought to pay; and
- (ii) in a case where the plaintiff had sustained a depressive neurosis caused by a feeling of guilt arising from the fact that if she had not allowed the respondent to drive a motor vehicle the accident which had befallen him would not have occurred such a condition was not one which was foreseeable and therefore the defendant was not liable to the plaintiff in damages for it.

In so holding, the Court stated that the course of authorities which defines the limits of liability for damages due to nervous shock demonstrates that compensation for some classes of psychiatric

damage have been excluded, even where a link with the defendant's negligence exists, and that the long history of judicial reasoning concerning psychiatric damage due to nervous shock, and the limitation upon the classes of shock regarded as foreseeable, and the (only partial) enlargement of the field of compensable damage by judicial evolution, acknowledge that psychiatric damage arising from circumstances external to the trauma caused by the negligent act can, and ought by parallel judicial approach to, be classified according to the kind of chain that links the damage with the negligent act, to the extent that the kind of chain must be examined to see if damage occurring in this kind of way was foreseeable.

The Court's judgment involved a detailed examination of foreseeability and causation in the law of negligence, including a consideration of the respective judgments of the Judicial Committee of the Privy Council, the House of Lords and the High Court of Australia in *Overseas Tankership (UK) Ltd v. Morts Dock and Engineering Co Ltd. (The Wagon Mound No. 1)* [1961] A.C. 388, *Hughes v. Lord Advocate* [1963] A.C. 837, the *Overseas Tankership (UK) Ltd v. Miller Steamship Co Ltd (The Wagon Mound No. 2)* [1967] A.C. 617, and *Mount Isa Mines Ltd v. Pusey* [1970] 125 C.L.R. 383.

Rowe v. McCartney [1974] 2 N.S.W.L.R. 72.

Narcotic drugs — Innocent possession — Drugs imported by post — Ratification of international convention

In a case involving a charge of possession of prohibited imports, and sending narcotic drugs through the Post Office, the New South Wales Court of Criminal appeal has held that —

- (i) the ratification by the Federal Parliament of the Single Convention on Narcotic Drugs 1961, together with the enactment of it of the provisions of the Customs Act 1967 and the Narcotic Drugs Act 1967, not only represented the acknowledgment of international concern for the wide detection and adequate punishment of offences in relation to narcotic drugs, but reflected the increased national anxiety in the same field of health and social welfare of the community generally;
- (ii) the provisions of the Customs Act 1901—1971 did not by implication exclude the exculpatory principle by which the person charged with illegal possession of narcotic drugs might prove an honest belief, on reasonable grounds, in the existence of circumstances which, if true, would make innocent that conduct with which he was charged;
- (iii) the Crown is not required in such a case to prove that the accused has knowledge or suspicion of, or reason to suspect, the possession of narcotic drugs in a parcel he has received at the Post Office;

- (iv) the word “possession” in s. 233B(1)(c) of the Customs Act 1901—1971, in the context in which it is found and having regard to the purposes which the legislative provision was intended to effect, means no more than de facto possession of the narcotic drugs concerned;
- (v) the mental element involved in such a case extends no further than the intention inherent in de facto possession of such drugs, namely, the intention to have exclusive physical control of some article which was in fact narcotic drugs or some article or some place wherein such drugs are in fact carried or contained or located. It is not inherent in that mental element that an accused should know or suspect, or have reason to suspect, that an item in his de facto possession comprises narcotic drugs;
- (vi) the onus is not upon the Crown to prove that the appellant knew or suspected, or had reason to suspect that the parcel he had collected at the Post Office contained narcotic drugs. It is necessary for the Crown to prove that he had de facto possession of the drugs, something the Crown had in the present case done by showing that he had exclusive physical control of the parcel that contained the drugs;
- (vii) it is not necessary for the Crown to prove any further mental element beyond the intention to acquire such control of the article in which the drugs were in fact to be found; and
- (viii) where an accused claimed, as here, that he did not know or suspect, or have reason to suspect, that the parcel contained narcotic drugs, it is upon him to satisfy the jury that arising from such a claim as to his mental attitude he had, in all the circumstances, a reasonable excuse for his possession of the drugs.

R. v. Bush (1975) 5 A.L.R. 387.

Workers’ compensation – whether illness contracted on foreign business trip an “injury” – meaning of “disease” – idiopathic and autogenous diseases – status of decisions of Privy Council in matters where appeals no longer lie to it

The High Court of Australia has dismissed an appeal by the appellant against a decision of the New South Wales Court of Appeal in which that Court had held that the respondent was entitled to workers’ compensation, under the provisions of the Workers’ Compensation Act, 1926 (N.S.W.), for serious disabilities sustained by him when in the appellant’s employment as a result of his having contracted meningo-encephalitis, a disease caused by a virus, when on a business visit to a foreign country.

The High Court held that such a disease was an ‘injury’, as defined in s. 6(1)(a) of the Act, which provides that:

“‘Injury’ means personal injury arising out of or in the course of employment, and includes –

- (a) a disease which is contracted by the worker in the course of his employment whether at or away from his place of employment and to which the employment was a contributing factor;”

In so holding, the Court had occasion to consider the nature of idiopathic and autogenous diseases, the nature of causation of injury and the meaning of the word “disease”, and held that, a morbid condition of the body, a disease, externally caused or excited, may be an “injury” within the meaning of the Act even though the worker’s employment has not contributed to the reception or contraction of that condition.

The Chief Justice of the High Court in his judgment posed, without deciding, the question whether the High Court was still bound by an earlier decision of the Judicial Committee of the Privy Council in *Slazengers (Australia) Pty. Ltd. v. Burnett* [1951] A.C. 13, assuming the Court felt that the Privy Council’s reasoning in that case was incorrect, having regard to the fact that appeals can no longer be brought to the Queen in Council from the decisions in the High Court in such matters. The Chief Justice felt that this question was one on which the High Court as a whole should pronounce, but he affirmed that the Court “accorded respect” to the decisions of the House of Lords and, to a lesser degree, to those of the Court of Appeal. He added that “in line with this approach to decisions which do not bind as precedents no doubt this Court will at least accord a like respect to decisions of the Privy Council to that which it is accustomed to accord to the House of Lords”.

Favelle Mort Ltd. v. Murray (1976) 56 A.L.J.R. 509.

Dangerous drugs—whether offence of absolute liability created

An appellant has successfully appealed to the Supreme Court of New South Wales, against his conviction for an offence against s. 21(1)(f) of the Poisons Act 1966 (N.S.W.) in that he had been found by the police in possession of “pipes or other utensils for use in connection with the smoking of . . . Indian Hemp”.

The Court held that—

- (i) s. 21 of the Act, while creating an offence in prima facie absolute terms, was nevertheless to be construed as requiring the prosecution to establish that the alleged offender had knowledge of all the facts that constituted the ingredients of the offence;
- (ii) the necessity to establish mens rea was not displaced either by the subject-matter of the legislation or by the language used in the section;

- (iii) the words “for use” in the section required the prosecution to establish that the defendant possessed utensils for future use in such connexion;
- (iv) there was no evidence that the appellant knew that the utensils found had been used in connection with the smoking of Indian Hemp;
- (v) in those circumstances, the appellant’s intention with respect to future use could not be inferred, or deduced, from such past use as could be established; and
- (vi) there was otherwise no evidence of the appellant’s intention with respect to the offence charged.

The Court considered the question whether a statute creating an offence in *prima facie* absolute terms is to be construed as nonetheless requiring that the prosecution must establish that the alleged offender had knowledge of all the facts which constituted the offence and, in so doing, applied the decision of New South Wales Court of Criminal Appeal in *R. v. McGrath* (1971) 2 N.S.W.L.R. 181. With regard to the meaning of the words “for use”, the Court applied *R. v. Ellames* [1974] 1 W.L.R. 1391, 1395, 1396 and 1397.

Erickson v. Pittard (1976) 2 N.S.W.L.R. 528.

Professional disciplinary tribunal—entitled to draw upon expert resources—whether entitled to draw upon own knowledge

The appellant appealed to the New South Wales Court of Appeal, pursuant to s. 19(1) of the Veterinary Surgeons Act 1923 (N.S.W.), against a finding of his profession’s disciplinary tribunal, constituted under s. 19E(1) of the Act, that he had been guilty of misconduct in a professional respect and that an order be made that his name should be removed from the register.

In dismissing the appellant’s appeal, the Court of Appeal held—

- (i) the disciplinary tribunal referred to in s. 19E(1) of the Act was, both in its constitutional and its executive power, an expert professional tribunal comparable with the medical disciplinary tribunal referred to in s. 28(1) of the Medical Practitioners Act 1938 (N.S.W.); and
- (ii) such a tribunal was entitled to draw upon its expert resources in reaching its conclusions, and expert evidence, although admissible if called, was unnecessary in such cases.

In so holding, the Court of Appeal also had occasion to consider whether members of a professional disciplinary body are entitled to draw upon their own knowledge in arriving at their decisions and whether an erroneous diagnosis by a veterinary surgeon or the administering by him of the incorrect treatment can amount to professional misconduct.

Kalil v. Bray and anor (1977) 1 N.S.W.L.R. 256.

Dangerous drugs—meaning of “possession”

The New South Wales Court of Criminal Appeal has dismissed the appellant’s appeal against his conviction for having in his possession prohibited imports, namely, narcotic goods consisting of a quantity of cannabis resin, to which s. 233B of the Customs Act 1901–1975 applied.

The drugs in question were found in a shopping bag that contained some goods to which the appellant claimed ownership. He, however, claimed that he did not know anything about the other contents of the bag, including the drugs.

The Court of Criminal Appeal, in dismissing the appeal, had occasion to compare the meaning of the words “has in his possession” in s. 233B of the Customs Act with the words “have in his possession” in s. 1(1) of the Drugs (Prevention of Misuse) Act 1967 (U.K.) as interpreted by the House of Lords in *Queen v. Warner* [1969] 2 A.C. 256.

R. v. Rawcliffe (1 April 1977: not yet reported).

Public health—selling adulterated food

The Supreme Court of New South Wales has had occasion to consider a prosecution for selling adulterated food, contrary to s. 10 of the Pure Food Act 1908 (N.S.W.). The defendant company relied on a document in writing, whereby its supplier guaranteed “that the goods or classes of goods hereunder described are, as sold by the company (meaning the supplier), not adulterated,”, and which stated: “The Guarantee is offered in connection with Section 47 of the Pure Food Act 1908. . . .”. The defendant also relied on letters of the same date, one from the supplier to the defendant, and the other in reply, in confirmation of the arrangement. The guarantee was in the form prescribed in Regulations made under the Act.

The magistrate dismissed the information in reliance on s. 47(1). On appeal by way of case stated, the Supreme Court held that—

- (i) s. 47(1) of the Pure Food Act plainly envisaged that a general guarantee, referred to in s. 47(1)(iii) and (iv), might be a continuing one, and need not refer to, or be given in respect of, a particular identifiable sale, or goods already in existence, but could relate to future, and as yet unidentified or unascertained, goods;
- (ii) the guarantee, by referring to “classes of goods. . . . as sold by the company”, and taken in conjunction with the two letters of the same date, demonstrated an agreement between the parties that, in consideration that the defendant would either then or in the future purchase goods from the supplier,

the latter would, in relation to all such purchases, and whilst the guarantee remained in force, guarantee that such goods were not adulterated;

- (iii) it was not necessary for any mention of the guarantee to be made in subsequent dealings between the parties, and accordingly it was open to the magistrate to infer that all later contracts between them were made upon the basis of its continuance, and of its application to those contracts; and
- (iv) therefore, it was open to the magistrate to conclude that the defendant had proved the requirements of s. 47(1)(a).

Boon v. F. Hannan Pty. Ltd. (1978) 1 N.S.W.L.R. 31.

Duty of care expected of a medical practitioner—whether hospital liable for negligence of doctor in relation to his patient

The plaintiff, a person who suffered from spina bifida and gross kypho-scoliosis, and who had a hairy naevus on the skin covering her spine, became a paraplegic by reason of a severance of the spinal cord resulting from halo-pelvic traction imposed on her in hospital on the advice of her doctor, who was an orthopaedic surgeon. She brought an action for damages for negligence against the hospital, the orthopaedic surgeon and a consulting neuro-surgeon. At the close of the plaintiff's case, the defendants made an application for a verdict by direction.

The Supreme Court of New South Wales dismissed the plaintiff's action against all three defendants. In doing so, the Supreme Court held that, *inter alia*,—

- (i) in an action such as this, it was for the jury to decide all questions of fact: but there must be a real issue of fact to be decided and, if the evidence was all one way, so that only one conclusion could be said to be reasonable, there was no function left for the jury to perform, in which case the court might properly take the matter into its own hands as being a matter of law, and might direct a verdict to be entered in accordance with the only evidence which was really presented in the case;
- (ii) a hospital in New South Wales (in possible contradistinction, in certain circumstances, from a hospital in England) was vicariously liable for the negligence of a doctor in relation to his patient in the hospital only if, in addition to having the power to direct the doctor as to what he was to do, the hospital also had the power, whether or not it exercised it, to direct him as to the manner in which he was to do his work; and
- (iii) applying that test in the present case, there was no evidence upon which the jury would be entitled to find that, if either of

the doctors who were the other defendants was negligent, the relationship between them, or either of them, and the hospital was such that the latter was responsible in law for that negligence.

In so holding, Supreme Court distinguished the decisions of the English courts in *Gold v. Essex County Council* [1942] 2 K.B. 293, *Cassidy v. Ministry of Health* [1951] 2 K.B. 343 and *Roe v. Minister of Health* [1954] 2 Q.B. 66, preferring to follow the decisions of the High Court of Australia in *Humberstone v. Northern Timber Mills* (1949) 79 C.L.R. 389, *Zuijs v. Wirth Brothers Pty Ltd* (1955) 93 C.L.R. 561 and *Australian Mutual Provident Society v. Chaplin* (1978) 18 A.L.R. 385.

As to the proper standard of the duty of care expected of a medical practitioner, the Supreme Court did, however, follow the English case of *Mahon v. Osborne* [1939] 2 K.B. 14, as well as referring to the decisions of the English courts in *Bolam v. Friern Hospital Management Committee* [1957] 1 W.L.R. 582, *Chin Keow v. Government of Malaysia* [1967] 1 W.L.R. 813 and *Robinson v. Post Office* [1974] 1 W.L.R. 1176.

Albrighton v. Royal Prince Alfred Hospital and others (1979) 2 N.S.W.L.R. 165.

Australia— Northern Territory

Prisoners – duty of care owed by prison

The plaintiff, a prisoner imprisoned in the Australian Government's prison in the Northern Territory, successfully sued the Australian Government for damages for personal injuries sustained by him as a result of a violent sexual assault carried out on him by two other prisoners in the prison, one of whom had a previous history of carrying out such assaults.

The Court held that the Australian Government had owed a duty of care to the plaintiff, and that it had failed to discharge this duty. In so deciding, the Court followed the decisions of other courts in similar cases, such as the English Court of Appeal in *Ellis v. Home Office* [1953] 2 All E.R. 149, the High Court of Australia in *Howard v. Jarvis* (1958) 98 C.L.R. 177, the Supreme Court of Victoria in *Hall v. Whitmore* [1961] V.R. 225, the Queensland Court of Appeal in *Ralph v. Stratton* [1969] Qd. R. 348, the House of Lords in *Dorset Yacht Co. v. Home Office* [1970] A.C. 1004 and the Supreme Court of Western Australia in *Dixon v. The State of Western Australia* [1974] W.A.R. 65, and confirmed the principle that there is a well-established common law duty on prison authorities to exercise reasonable care for the safety of prisoners during their detention in custody.

L. v. Commonwealth (1976) 10 A.L.R. 269.

Capacity to stand trial—defendant deaf, dumb and member of Aboriginal community—no evidence of mental incapacity

The question of the defendant's capacity to stand trial on a charge of assault of a female in circumstances of aggravation was referred to the Supreme Court of the Northern Territory having regard to the fact that it was either proved or admitted by the parties that the defendant—

- (i) was totally deaf from birth and was unable to use speech to communicate;
- (ii) was a full blood Aboriginal man who had been brought up in a tribal Aboriginal Community;
- (iii) had not absorbed the cultural or moral values of Aboriginal or tribal society;
- (iv) had not absorbed the cultural or moral values of European society; and
- (v) was of average or above average intelligence, with no evidence of any mental incapacity.

The question of law upon which the case was stated for the opinion of the Supreme Court was whether for the magistrate to proceed in the circumstances would be (a) contrary to law; (b) in excess of the jurisdiction of the court of summary jurisdiction; (c) a denial of natural justice; or (d) improper in the circumstances.

The Supreme Court held that—

the answer to the question posed in the Special Case was that to proceed in the circumstances would be contrary to law.

In so holding, the Court concluded that, on the authority of *R. v. Pritchard* (1836) 173 E.R. 135, *R. v. Berry* [1876] 1 Q.B. 447, *R. v. Presser* [1958] V.R. 45 and *R. v. Podola* [1960] 1 Q.B. 325, the defendant should be treated as if he were insane but that, notwithstanding the defendant's disabilities, a committal hearing might proceed because no plea was required from the defendant in such proceedings. The Court concluded that the state of the law in this area was defective and that it would be desirable if a legislative amendment could be introduced whereby the magistrate could have committed the defendant to trial on the assumption that the jury empanelled for the purpose would find the defendant unfit to plead and then to have the Supreme Court order that the defendant be kept in strict custody to await the Governor-General's pleasure.

Re an Information Laid by Ian Edward Pioch Against Sydney Lauder in the Court of Summary Jurisdiction of Alice Springs and in the Matter of a Special Case Stated Under Section 162 of the Justices Ordinance 1928–1976.

Pioch v. Lauder (1976) 13 A.L.R. 266.

**Australia—
Queensland**

Drunken driving—failure to provide specimen of breath

The High Court of Australia has had occasion to consider the offence of the driver of a motor vehicle failing to take a breathalyser test, contrary to the requirements of s. 16 of the Traffic Acts, 1949–1974 (Qld.), particularly in relation to the meaning of the words “prescribed” and “fails” which occur in that section.

The High Court also had to consider whether the offence of failing to provide, as prescribed, a specimen of the motorist’s breath is constituted unless and until the Crown establishes the making of an appropriate direction by a medical practitioner or authorised member of the Police Force.

Hammond v. Lavender (1976) 50 A.L.J.R. 728.

Obscene publications—onus to prove bona fide medical work or treatise

The Full Court of the Supreme Court of Queensland has dismissed an order nisi to review sought by the appellant in a case in which the appellant, a newsagent, had been found guilty of having had in his possession an obscene publication, contrary to s. 15(3) of the Vagrants, Gaming and Other Offences Act 1931 – 1971 (Qld).

The appellant contended, inter alia, that the publication concerned was in fact a bona fide medical work or treatise for the purposes of s. 17 of the Act, and accordingly he was entitled to retain lawful possession of the publication.

In dismissing the appellant’s application, the Full Court held that—

- (i) upon proceedings brought pursuant to s. 15(3) of the Act, the onus of proof that any article seized was a bona fide medical work or treatise was upon the person showing cause; and
- (ii) in considering whether a publication was such a work for purposes of the Act (a) evidence that the publication’s editorial board consisted of learned and responsible people and that responsible persons either subscribed to the publication or sought the advice of its editors to assist in resolving the sexual problems of patients was beside the point, (b) the fact that the publication might have a therapeutic effect did not mean that it was not obscene or that it was a medical work or treatise, (c) that it was the product which came under view rather than the motives and objectives of the publishers that mattered; and
- (iii) the manner of presentation of the publication was of critical importance, even were one to assume the subject-matter and qualifications and standing of contributors to be typical of such a work or treatise.

Scott v. Reid; Ex parte Reid (1979) Qd. R. 37.

Possession of drugs—“have in possession”—entrapment

The Queensland Court of Criminal Appeal has had occasion to consider the meaning of the term “have in possession”, as defined in s. 5(1) of the Health Act 1937 – 1976 (Qld). The definition of this term includes the phrase “having under control”.

The Court held that where an accused had got a package of drugs into his hands and signed a receipt for them, he “had control” of the destiny of the package for purposes of the Act.

In so holding, the Court also observed that in dealing with cases such as this, and with drug cases generally, those who were trying to administer the law are not to be entirely frustrated by an ideal of fairness out of proportion to the offence, and that where, as here, the accused had made a statement to a police undercover agent corroborative of admissions allegedly made to the police before arrest, the defence of entrapment had not been made out.

R. v. Warnemide (1978) Qd. R. 37.

Medical practitioner – claims in excess – strict liability for correctness of claims

The appellant, a qualified medical practitioner, was convicted of five charges laid under s. 129 of the Federal Health Insurance Act 1973. She was found to have claimed from the Health Insurance Commission amounts for consultations of 25 minutes or over, whereas in fact these consultations had taken less than 25 minutes, the latter category entitling her to a lesser sum than the former.

The magistrate considered that s. 129 of the Act imposed strict liability on a medical practitioner for the correctness of claims made on the Commission, although he based his decision on the fact that the appellant had herself inspected the record books daily and controlled and authorised her agents to complete and submit forms incorporating the relevant information. From these convictions the appellant appealed and returned orders to review.

The Queensland Court of Criminal Appeal, in discharging the order nisi and dismissing the appellant’s appeal, held that—
section 129 of the Health Insurance Act did impose strict liability because—

- (a) the purpose of the section was to ensure that the Health Insurance Fund was not made the target of false or misleading claims,
- (b) the making of the claim was under the control of a practitioner, who personally signed the form,
- (c) the Act could be effectively enforced only if medical practitioners were made responsible for the accuracy of the material in the forms submitted under cover of a claim, and
- (d) s. 129(3) of the Act placed the onus on the medical practitioner

charged under the section to show that he did not know, and had no reason to suspect, that the material to which the charge related was false or misleading.

In so holding, the Court of Criminal Appeal applied the judgment of the Privy Council in *Lim Chin Aik v. R.* [1963] A.C. 160.

R. v. White (1979) 23 A.C.T.R. 432.

Dangerous drugs—importation and possession of heroin—onus on defendant to prove a “reasonable excuse” for possession

The applicant was charged on an indictment containing two counts charging him under s. 233B(2)(b) and (c) of the Customs Act 1901 with, respectively the importation and possession of prohibited imports, namely a quantity of heroin.

Section 233B of the Act provides that a person found guilty of any of the offences specified therein is punishable under s. 235 of the Act. Section 235 provides a penalty and, where “the court” is satisfied that the offence involves a narcotic substance that is not less than the traffickable quantity as defined by the Act, a much more substantial penalty.

Before pleas were taken, the appellant’s counsel demurred and moved to quash the indictment. He argued that (a) s. 235 created an offence separate from s. 233B in so far as it required determinations, involving substantial consequences, as to traffickable quantity, and (b) because such determinations must be by a judge and not a jury, s. 235 was invalid as infringing s. 80 of the Australian Constitution which provides that indictable offences must be tried before a jury.

The trial judge overruled the demurrer and disallowed the motion. The trial proceeded.

The accused admitted that he imported the substance found to be heroin and that he had it in his possession, inside his clothing, when apprehended. However, he claimed that he had believed the substance to be a combination of vitamins, steroids and yeast; and that he had not known or suspected that it was a narcotic substance or a substance the possession of which was prohibited by Federal law.

The questions left to the jury included the question whether there was a traffickable quantity of heroin involved. The accused was found guilty on both counts, and appealed.

The Queensland Court of Criminal Appeal, in dismissing the appellant’s appeal, held that—

- (i) as to both counts, s. 235 of the Customs Act did not infringe s. 80 of the Constitution because—
 - (a) it was a sentencing provision and did not add a fresh element to offences provided by s. 233B,

- (b) s. 80 of the Constitution was concerned with the trial of offences, not the passing of sentence,
- (c) the sentencing judge had the responsibility to determine the facts when sentencing provided that his determination did not conflict with the jury's verdict,
- (d) the words "the court" in s. 235 meant the sentencing judge, and
- (e) the Federal Parliament could properly commit to the jury, as in s. 233B, the determination of elements of an offence and to the judge, as in s. 235, responsibility for sentencing;
- (ii) as to count under s. 233B(1)(c)—
 - (a) if a person was in fact proved to have been in possession of prohibited imports, the onus was on him to prove, on the balance of probabilities, a reasonable excuse for that actual possession,
 - (b) the words "without reasonable excuse (proof whereof shall lie on him) has in his possession any prohibited imports to which this section applies" must be given the same construction in s. 233B(1)(c) and (ca), and
 - (c) where a Federal Act was being applied by State courts it was wholly undesirable for different interpretations to be applied by courts of different States;
- (iii) as to the count under s. 233B(1)(b)—
 - (a) there was no onus on the prosecution either to establish mens rea on the part of the accused or to exclude the operation of the defence of mistake of fact,
 - (b) having regard to the subject-matter of the legislation and the virtual impossibility of proving the state of mind of an importer of narcotic goods in the absence of admissions, while there was much to be said to the contrary, it seemed that the legislature had intended to create the offence by proof of the actual importing or attempting to import,
 - (c) the absence in s. 233B(1)(b) and (d) of express reference, as in paras (a), (c) and (ca), to onus of proof did not indicate that an onus was on the prosecution to prove an accused's state of mind or that an approach to onus different from that relative to the latter was to be taken to the former paragraphs, and
 - (d) different considerations applied to the concepts of importation and possession because the provisions as to onus of proof in s. 233B(1)(a), (c) and (ca) were intended to allow a defence based on possible innocent, though actual possession; and
- (iv) there had been no miscarriage of justice brought about by the trial judge's questioning of the accused because a trial judge was entitled to question a witness not only to clear up ambiguities but also for the purpose of testing his evidence, if

the judge had reason to believe that the evidence was or might not be in accordance with the truth.

R. v. Gardner (1980) 28 A.L.R. 140.

**Australia –
South
Australia**

Judicial notice of Gazette – nature of unsworn statements – effect of failure of accused to take objections during course of trial

The South Australian Court of Appeal has dismissed an appeal by the appellant against his conviction for having knowingly, by a false representation, induced a chemist to dispense a false prescription, contrary to s. 9(2)(a) of the Narcotic and Psychotropic Drugs Act, 1934–1974 (S.A.) and with having forged and uttered a prescription, contrary to s. 9(1) of that Act.

By a Proclamation published in the South Australian Government Gazette a particular drug had been declared to be a drug to which the Act applied. At the appellant's trial, counsel for the Crown "notionally" tendered the Government Gazette containing the gazettal of the Proclamation and the trial judge, stating that he had seen the Proclamation, did not require the Gazette actually to be put in evidence. The appellant's counsel did not object to this being done. Oral evidence was then given by a medical witness that the drug that had been found in the appellant's possession was the same drug as that which had been referred to in the proclamation, and the trial judge directed the jury that the drug found in the appellant's possession was one to which the Act applied.

On appeal, the Court of Appeal held, *inter alia*, that –

- (i) in view of the provisions of s. 4(3) of the Act, the trial judge was entitled to take judicial notice of the Proclamation without the Government Gazette actually being tendered in evidence;
- (ii) in any event, as the appellant's counsel had remained silent when counsel for the Crown had produced the Gazette and the trial judge had ruled that it was not necessary for the Gazette actually to be tendered in evidence, the appellant was bound by the course of the trial, and was not entitled to complain, on appeal, of the Crown's failure actually to tender the Gazette in evidence;
- (iii) in the circumstances, the trial judge had been correct in taking judicial notice of the Proclamation and in directing the jury as he had done; and
- (iv) the identification of the drug found in the appellant's possession as the drug referred to in the Proclamation, a matter which depended upon the oral evidence of a medical witness, was a question of fact for the jury, and accordingly should not have been taken away from them.

In so holding, the Court of Appeal gave detailed consideration to the failure of an accused's counsel to take objections during the

course of a trial, the extent of judicial notice, the functions of a court of criminal appeal, and the nature of unsworn statements.

R. v. Harm (1975) 13 S.A.S.R. 84.

Narcotic and psychotropic drugs—necessity of evidence of the nature and effects of the drug even where charge admitted

The Supreme Court of South Australia has held that—

in the case of a charge for the offence of illegally possessing Indian hemp, contrary to s. 5 of the Narcotic and Psychotropic Drugs Act 1934—1972 (S.A.), the court of summary jurisdiction must have evidence placed before it of the nature and effects of the drug even where, as here, the appellant had admitted to the charge.

Pearson v. Samuels (1976) 13 S.A.S.R. 428.

Dangerous drugs—evidence of nature and effect

The Full Court of the Supreme Court of South Australia has held that—

- (i) on the hearing of a charge of an offence against the provisions of the Narcotic and Psychotropic Drugs Act, 1934—1974 (S.A.) in respect of the drug Indian hemp it was not necessary that evidence should be given as to the nature and effect of that drug as it was now generally accepted that the drug was the least harmful of the drugs to which the Act applied;
- (ii) the court hearing the charge might proceed to impose sentence upon that basis, unless either side wished to tender more specific evidence about Indian hemp; and
- (iii) on the hearing of a charge relating to other drugs, however, evidence as to the nature and effect of those drugs should be given.

The Queen v. Tideman (1976) 14 S.A.S.R. 130.

Compensation for criminal injuries—whether emotional upset with consequent ill effects constitutes “injury”

The Full Court of the Supreme Court of South Australia heard an appeal in a case involving an application for an order for compensation under the Criminal Injuries Compensation Act 1969–1974 (S.A.). The application had been made by the widow and three children of a man who had been murdered in the presence of his wife during an armed hold up by three men. One of the three robbers was convicted of murder, and the other two of manslaughter. The applicants claimed that they were entitled to compensation under the Act for the shock and emotional disturbance they had suffered as a result of the death of their husband and father.

The Full Court held—

- (i) the applicants were persons to whom compensation might be ordered and paid under s. 4 of the Act;
- (ii) the evidence given at the trial of the three men might be used to determine the question of compensation, and that further evidence was admissible for the purpose of determining that question; and
- (iii) emotional upset, with consequent ill effects, was an “injury” within the meaning of s. 4 of the Act.

In so holding, the Full Court was particularly concerned with the definition of the word “injury” in the Act, and in interpreting its meaning were influenced by the dictum of Lord Denning, M.R. in *Hinz v. Berry* [1970] 2 Q.B. 40, 42.

Battista and ors v. Cooper and ors (1976) S.A.S.R. 225 (Sup. Ct.).

Compensation for criminal injuries—“injury”

The Full Court of the Supreme Court of South Australia dismissed an appeal against an award of compensation that had been made to a male inmate of an institution who had been forced by two other male inmates, by threats and fear, to submit to acts of oral intercourse.

In *In re Gage and Bird* (1978) 19 S.A.S.R. 239 the Supreme Court Compensation Act 1969–1974 (S.A.) on the ground that the inmate had sustained an “injury” arising out of a criminal act.

The Full Court, in dismissing the appeal, held that the combination of physical revulsion and mental shock caused by the crime which had been committed on the inmate constituted an “injury” for purposes of the Act.

In re Bird (1979) 21 S.A.S.R. 76.

Dangerous drugs — meaning of “heroin” — particulars to be contained in information

An information charged the accused with having in his possession prohibited imports, to which s. 233B of the Customs Act 1901 applied, that were reasonably suspected of having been imported into Australia contrary to s. 233B(1)(ca) of the Act.

Particulars of the offence contained in the information alleged that the prohibited imports were narcotic goods consisting of 10.9 grams of heroin, and evidence given for the prosecution showed that the substance which was the subject-matter of the charge weighed 10.9 grams and contained, inter alia, 12 percent of heroin, otherwise known as “diacetylmorphine.”

The Supreme Court of South Australia held—

- (i) that the word “heroin” in Schedule VI of the Act meant

“diacetylmorphine”, and not the whole substance or preparation containing diacetylmorphine; and

- (ii) that the information should be amended so that the amount of heroin stated in the particulars was the amount of diacetylmorphine shown by the evidence to have been contained in the substance which was the subject-matter of the charge.

R. v. Gligora (1979) 22 S.A.S.R. 159.

Disciplinary inquiry by Pharmacy Board—whether refusal of legal representation denial of natural justice

The Supreme Court of South Australia heard an appeal by the appellant, a pharmacist, against his being found guilty by the respondent Board of unprofessional conduct and being suspended from registration as a pharmacist.

The Board, which was established under the Pharmacy Act 1935 – 1973 (S.A.) is empowered under s. 19 of the Act to conduct a “full inquiry” into the conduct of any registered pharmacist and, upon a finding of guilty of infamous or unprofessional conduct, to make disciplinary orders against him, including the cancellation of his licence to practise.

In appealing to the Supreme Court, the appellant claimed, *inter alia*, that he had been denied natural justice by the Board because the Board had refused him the right to legal representation and to cross-examine witnesses.

The Supreme Court, in allowing the appellant’s appeal, held that where the Pharmacy Board of South Australia conducted an inquiry pursuant to s. 19 of the Pharmacy Act (S.A.) into the conduct of a pharmaceutical chemist, the chemist was entitled to legal representation before the Board and to cross-examine witnesses who had given evidence before the Board.

In so holding, the Supreme Court examined the nature of inquiries conducted by the Board and the procedure to be followed at such inquiries, and either followed, applied or discussed the decisions in such English and Australian cases as *R. v. Assessment Committee of St Mary Abbots Kensington* [1891] 1 Q.B. 378, *The King v The Board of Appeal; Ex parte Kay* (1916) 22 C.L.R. 183, *General Medical Council v. Spackman* [1943] A.C. 627, and *Hoile v. Medical Board of South Australia* (1960) 104 C.L.R. 157 which considered the right of a person appearing before a disciplinary tribunal to be represented by an agent and to cross-examine witnesses.

The Supreme Court expressly distinguished the recent English decisions in *Pett v. Greyhound Racing Association Ltd (No. 1)* [1969] 1 Q.B. 125, *Pett v. Greyhound Racing Association Ltd (No. 2)* [1970] 1 Q.B. 44 and *Enderby Town Football Club Ltd v. Football Association Ltd* [1971] Ch. 591 on the ground that such cases were “irrelevant”, being confined as they were to disciplined forces which

form a group of their own, “possibly on the basis that persons joining such forces may be taken to have voluntarily surrendered some of their freedom and rights in the interests of discipline and in the recognition of the demands of authoritarian structures”.

In so saying, the Supreme Court also stated that “For somewhat similar reasons, prisoners may be taken to have involuntarily surrendered certain rights and freedoms”.

Kruger v. Pharmacy Board of South Australia (1979) 22 S.A.S.R. 339.

Sentencing — whether sentence varies for different drugs

The Full Court of the Supreme Court of South Australia has held, inter alia, that the onus is on the Crown, if it claims that hashish is a more deleterious drug than Indian hemp, to call evidence and demonstrate that fact to the sentencing court.

R. v. Vivian (1979) 23 S.A.S.R. 45.

Dangerous drugs — possession of any appliance for “use” — whether includes use by persons other than the accused

Section 5(1)(c) of the Narcotic and Psychotropic Drugs Act 1934–1978 (S.A.) provides that it is an offence for a person to have in his possession “any pipes, syringes or other utensils or any appliance or thing for use in connection with the preparation, smoking or administration of any drug to which this Act applies”.

The Full Court of the Supreme Court of South Australia held that the “use” specified in s. 5(1)(c) of the Act is not restricted to use by the person in possession of the pipes or other things referred to in that paragraph, but includes use by other persons.

R. v. Sims (1980) 23 S.A.S.R. 115.

Australia— Tasmania

Prepacked food — labels not specifying date of packing — “label”

The Supreme Court of Tasmania, in an appeal by the appellant company from a conviction of having sold packages containing meat and other related goods in a prepacked form, when the label attached to such packages did not specify the date on which they had been packed, contrary to regulation 35(1) and (3) of the Public Health (Food and Drugs Standards) Regulations 1971 (Tas.), held, inter alia, —

- (i) the purpose of the Regulations was to protect the buying public from unwittingly buying stale meat;
- (ii) when regulation 35 spoke of the word “label” it was speaking of the label required by the Public Health Act 1962 (Tas.);

- (iii) the definition of “label” in regulation 2 of the Regulations should be interpreted by inserting before “to a package” the words “on or”;
- (iv) a plastic container could be regarded as a label in the ordinary sense of that word; and
- (v) as the goods were at the relevant time in the possession of the appellant company, it was not an answer to the charge to say that the goods were not for sale unless and until the driver of the appellant’s delivery van had checked and found that the packages contained the necessary date labels.

Wignalls Smallgoods Pty Ltd. v. Kiely 31 L.G.R.A. 424.

Murder—defence of mental disorder—whether separate defence of automatism can be made on same evidence

The appellant was charged of an indictment for murder by stabbing. The appellant’s defence was that by reason of mental disorder his act was not voluntary and intentional.

The trial judge charged the jury that they could find insanity and refused to put automatism as a separate defence. The jury convicted the appellant, who appealed to the Tasmanian Court of Criminal Appeal.

The Court of Criminal Appeal, in dismissing the appeal, held that where there was evidence of mental disorder on which the jury could have found insanity, a separate defence of automatism could not be made on the same evidence.

Williams v. The Queen (1978) Tas. S.R. 98.

**Australia—
Victoria**

Insanity — Conceptual nature of — Insane and sane accused jointly charged

The Full Court of the Supreme Court of Victoria has held that —

- (i) where there is evidence from which a jury may infer that an accused was not insane at the time of a killing and medical evidence that he was at that time insane, it is imperative that the jury should be adequately instructed as to what is meant by ‘knowing’ that the act was wrong;
- (ii) there may be many different ways of explaining to a jury the conceptual difficulties involved in a disordered mind “knowing” that an act was wrong, but to tell them that if, through the disordered condition of his mind, the accused could not reason about the matter with a moderate degree of sense and composure, he could not “know” that what he was doing was wrong, had for long been accepted as a practical synthesis of the ideas involved;
- (iii) there is nothing in the legal concept of insanity which precludes the possibility of a man assenting together with an

- insane man to do an act and both men thereafter acting together to do the act;
- (iv) such an assent together to do the physical acts which were the necessary part of the actus reus of a crime, made the sane man guilty of the crime if he had the necessary mens rea, although the insane man was not guilty on grounds of his insanity;
 - (v) in a particular case however the nature of the insanity may preclude the insane man from being capable of the assent which is necessary for the two men to be acting in concert; and
 - (vi) a sane person could be found guilty of aiding and abetting an insane person.

R. v. Matusевич and Thompson [1976] W.R. 460.

Town planning authority – power to impose conditions – statutory interpretation – whether legislation enacted but not yet in force can be called in aid

The Supreme Court of Victoria has held, inter alia, that –

- (i) the Court could take into account a statutory amendment to local government legislation when interpreting such legislation even though the amending legislation is not yet in force;
- (ii) the power of a town planning authority, or, on appeal, of the appeals tribunal, to impose conditions other than those specified in the relevant town planning scheme is limited to conditions relating to town planning considerations;
- (iii) upon an appeal against the refusal or failure of a planning authority to grant a permit, the appeals tribunal may direct that a permit should issue, and that any such permit can contain any condition which may lawfully be imposed and which is specified in the determination;
- (iv) a town planning condition is void for uncertainty only if it can be given no meaning, or no sensible or ascertainable meaning, and not merely because it is ambiguous or leads to absurd results;
- (v) in town planning cases an over-technical approach should not be adopted in seeking to give a sensible meaning to conditions imposed in permits;
- (vi) a condition in a permit which makes the permissible subdivision and use of the land for detached housing subject to the provision of water supply and sewerage is neither void for uncertainty nor unreasonable;
- (vii) the availability of sewerage is a legitimate and proper consideration relevant to town planning; and
- (viii) it would be entirely contrary to the concept of town planning for the town planning authority or, on appeal, the appeals tribunal to authorise the subdivision of broad acres into

housing allotments without giving serious consideration to the provision of water supply and sewerage which are most relevant to the preservation of amenities and to the proper use of the land for housing.

In so holding, the Court also gave consideration to the meaning of the words “issued” and “granted” in relation to permits either issued or granted under the Town and Country Planning Act 1961 (Vic.).

Weigall Constructions Pty. Ltd. v. Melbourne & Metropolitan Board of Works 30 L.G.R.A. 333.

Sale of unwholesome goods – whether contaminated food required to be positively injurious to health – “unwholesome” – “insect”

The Supreme Court of Victoria has considered whether the applicant retailer, in selling a packet of breakfast cereal to a customer that contained matted and cobwebbing substances and live and crawling grubs, had been guilty of the offences of having possession of unwholesome goods for sale and of selling unwholesome goods contrary to the Cleanliness (Food, Drugs and Substances) Regulations 1953 (Vic.).

The Court held, inter alia, that –

- (i) the word “unwholesome” in section 276 of the Health Act 1958 (Vic) means not only positively injurious to health but also not favourable to or promoting good health, or not wholesome or healthful;
- (ii) food can be “unwholesome” without it having to be positively injurious to a person’s health;
- (iii) evidence that grubs found in food can be eaten without ill effects is inconclusive;
- (iv) the addition of extraneous matter to otherwise unwholesome food does not make it “unwholesome” if no change is made in its quality, but that principle does not apply where the whole contents of a packet are affected;
- (v) when a packet of food is tendered as an exhibit along with evidence of its condition at the relevant time, the court need not rely on expert opinion on the question of the wholesomeness of its contents, but can form its own judgment;
- (vi) there is no requirement that an analysis of food must be made before a prosecution is brought on the ground that it is unwholesome;
- (vii) accordingly, the fact that in the present case the contents of the cereal were not submitted for analysis did not invalidate the prosecutions; and
- (viii) the word “insect” in the regulation 6(j) of the Regulations is used in its popular sense, and expert evidence that the grubs were “insects” was therefore unnecessary.

Minister v. Woolworths (Victoria) Ltd. 30 L.G.R.A. 134.

Probation order—whether condition for submission to psychiatric treatment justified

The Full Court of the Supreme Court of Victoria had occasion to consider the circumstances in which a probation order should be made against a defendant on condition that he submitted to psychiatric or psychological treatment.

The Full Court held that –

- (i) a probation order should not be made releasing a convicted person on condition that he submit himself to psychiatric or psychological treatment unless –
 - (a) there was a practical way of treating his psychiatric or psychological condition,
 - (b) he consented to a requirement in a probation order that he submit himself to psychiatric or psychological treatment, and
 - (c) the various persons, hospitals and authorities necessary to provide treatment were prepared to accept the accused as a patient; and
- (ii) treatment should not be ordered with the consent of a convicted person unless he knew what treatment was intended to be carried out and he was capable of comprehending what was involved in it and of expressing a real and informed willingness to submit to it.

R. v. Tutchell (1979) V.R. 248.

**Australia—
Western
Australia**

Medical fees reimbursement cheques — obligations of the Health Insurance Commission

The first plaintiff had been a patient of the second plaintiff, a medical practitioner, for some years and it had been his custom when submitting a medical fees reimbursement form to the defendant, a statutory corporation providing patient cover for the cost of hospital and medical expenses, to attach to it a direction addressed to the Manager requesting the fund specifically not to send his refund cheques to the second plaintiff's home address but instead a postal address at which that plaintiff practised. Although initially the fund complied with the first plaintiff's request, it subsequently informed him that it would no longer do so but would insist on sending the cheques to the second plaintiff's home address, claiming that this was required of it under s. 20(2) of the Health Insurance Act 1973.

The plaintiffs each sought declarations that the first plaintiff was entitled to nominate an address, other than his own, for sending "pay doctor" fund cheques, and that the defendant fund's obligations to give the cheque to the second plaintiff pursuant to the Act would thereby be validly discharged.

The Supreme Court of Western Australia dismissed both summonses. In so doing, the Supreme Court held —

- (i) under the Act the defendant was not compelled to send or hand the cheques payable to a patient to the patient at an address nominated by the patient;
- (ii) the defendant's obligation under the Act was merely to give the cheque to the patient;
- (iii) that was accomplished at whatever address or place the patient received the cheque, notwithstanding what other place or address he may have nominated as the address for payment; and
- (iv) the second plaintiff had no standing to maintain his action against the defendant because the question of construction of the sub-section that the originating summonses raised was not one which would establish whether or not he was entitled to any legal or equitable right.

Stack v. The Health Insurance Commission; Kirkman v. The Health Insurance Commission (21 October 1977: not yet reported).

Dangerous drugs—connotation of a word as part of interpretation of statute—trial judge to decide meaning—whether international convention could control or influence expressions in statute

The High Court of Australia granted the applicant special leave to appeal from the dismissal of her appeal by the Western Australian Court of Criminal Appeal (*Yager v. R.* (1976) 11 A.L.R. 646) in a case in which she had been convicted of two offences against the Customs Act 1901—1975, namely that she had, in contravention of s. 233B(1)(b), imported into Australia a prohibited import, and that she had, in contravention of s. 233(1)(c), without reasonable excuse had in her possession prohibited imports, namely a quantity of cannabis. The High Court, by a majority, dismissed the applicant's appeal against conviction.

Section 4 of the Customs Act defines "cannabis" as a "cannabis plant" and "cannabis plant" as "a plant of the genus *cannabis sativa*". At her trial, the applicant admitted every element of the charges against her, except that the substance was a prohibited import. She admitted that the material in her possession was "plant material of the genus *cannabis*", but did not admit that it was "cannabis *sativa*". The trial judge ruled that he would direct the jury, as a matter of law, that the phrase "plant of the genus *cannabis sativa*" in the Customs Act embraced all plants of the genus *cannabis*. The applicant then had appealed unsuccessfully to the Western Australian court of Criminal Appeal on the grounds that—

- (a) because the latest botanic opinion was that there were three species of the genus *cannabis*, *cannabis sativa* being one of them, the trial judge had misinterpreted the Act and the question whether the substance possessed by the applicant was or was not *cannabis sativa* should have been left to the jury; and

(b) the trial judge had erred in directing the jury to return a verdict of guilty.

In arriving at its decision, the High Court held—

- (i) it may be accepted that when a statute uses an expression which is not self-explanatory it may be necessary to determine to what the statute is referring in using the descriptive expression;
- (ii) once the meaning is assigned, the further question whether some substance or thing in fact falls within the description of the statute properly understood is a matter of fact to be determined by the tribunal of fact;
- (iii) where the resolution of the connotation of a word used by the legislature which is not self-explanatory is undertaken as a part of the interpretation of the statute, it is for the judge and not for the tribunal of fact to decide;
- (iv) it was for the trial judge to decide the meaning of the descriptive expression “genus cannabis sativa”;
- (v) the description “cannabis sativa” was an appropriate description of the genus cannabis at the time when the Act was passed;
- (vi) the meaning in the Act could not be determined by the circumstance that the description of the genus in the Act did not conform to that contained in the *International Code of Botanical Nomenclature*;
- (vii) although reference to that Code might be significant in order to identify the genus cannabis sativa, failure to comply with the Code when describing a genus would not warrant the conclusion that Parliament was specifying only a particular species;
- (viii) except, possibly, in the case where a special verdict had been found, a trial judge might never direct a jury to enter a verdict of guilty;
- (ix) a trial judge must direct a jury on any question of law that arose;
- (x) although there was no reason why the trial judge should not make it clear to the jury that if they do their duty they will return a verdict of guilty, it was still necessary for the judge to leave it to the jury to bring in a verdict, and he could not dictate the verdict they were to return;
- (xi) since *Bushell's case* (1670) 6 State Trials 999, it had been a fundamental principle of constitutional law that a juror might not be punished for returning a verdict against the direction of the court, and hence might not be intimidated into returning a particular verdict;
- (xii) when the jury was asked to return a general verdict, they had the right and duty to determine, not only the facts of the case, but the guilt or innocence of the accused;

- (xiii) although there were exceptional cases in which a judge might ask a jury to reconsider their verdict, if they insisted upon their verdict the judge was bound to receive it;
- (xiv) there was no legitimate foundation for resorting to the definitions of cannabis contained in the Narcotic Drugs Act 1961, an Act giving force to the Single Convention on Narcotic Drugs 1961, for the purpose of modifying or qualifying another statutory definition contained in a different Act of Parliament, such as the Customs Act;
- (xv) there was no basis on which the provisions of an international convention could control or influence the meaning of words or expressions used in a statute, unless it appeared that the statute was intended to give effect to the convention, in which event it was, on the authority of *Salomon v. Commissioners of Customs and Excise* [1967] 2 Q.B. 116 and *The Banco* [1971] P. 137, legitimate to resort to the convention to resolve the ambiguity in the statute;
- (xvi) as cannabis sativa was a technical name or description, expert evidence to its denotation and identifying characteristics was receivable; and
- (xvii) at best the applicant's case was that Parliament had been mistaken in treating cannabis sativa as a genus, but that could not alter the circumstance that Parliament had prescribed a genus and allow the Court to say that Parliament had prescribed a species.

Yager v. R. (1977) 13 A.L.R. 247.

The Bahamas

Death certificate—autopsy report—whether inadmissible as hearsay

In a trial for murder, the trial judge admitted both the death certificate and an autopsy report.

Section 42(5) of the Evidence Ordinance provides—

Hearsay evidence may not be admitted except in following cases:—

where the statement is contained in any official record, book or register kept for the information of the Crown or for public reference and was made as the result of inquiry by a public servant in discharge of a duty enjoined by the law of the country in which such official record, book or register is kept

Held by the Court of Appeal—

- (i) to be admissible under the subsection the document or record must be one “made as a result of inquiry by a public servant in discharge of a duty enjoined by “law”;
- (ii) the post-mortem examination and subsequent report were performed and made pursuant to such a public duty, and the report was a “record . . . kept for the information of the Crown”;

- (iii) the subsection was not a statutory codification of the common law of England and fell to be interpreted according to the plain meaning of the words;
- (iv) similarly, the death certificate was undoubtedly made “as the result of inquiry” by the doctor, who was a “public servant” however it was not made “in discharge of a duty” enjoined by any law, and so, unlike the autopsy report, it had been wrongly admitted in evidence;
- (v) even without both documents, the cause of death had been proved conclusively by admissible evidence.

Newbold v. Regina (Appeal No. 21 of 1979: 6 March 1980)

Belize

Murder—absence of apparent motive—whether raises the plea of insanity—prejudicial effect of newspaper reports

The appellant was convicted of murder. In an unsworn statement from the dock he denied being anywhere near the scene of the crime. Counsel did, however, in cross-examination of the doctor raise the possibility of a person not knowing what he was doing while he was drunk or under the influence of drugs. The doctor declined to make any statement on the effects of alcohol or drugs of unspecified quantity on persons in general. Counsel for the appellant submitted that the failure of the judge to put to the jury the possibility of insanity, on the basis of these questions and answers and the absence of proof of any motive, vitiated the conviction.

The Court held—

the absence of apparent motive does not ipso facto raise the possibility of insanity. The mere fact of an apparent lack of motive did not, in the absence of some other fact or circumstance arising from the evidence, raise the issue of insanity and place upon the trial judge a duty to put the matter to the jury. Hypothetical questions put by defence counsel to a Crown witness cannot, in the absence of any factual basis for them, support a submission that the defence of insanity has been raised irrespective of the fact that the answers to such hypothetical questions do not in any way support the suggestion that the accused may have been insane. The obligation of a judge to put to the jury a defence not raised by the accused or by counsel refers to a defence which arises from the evidence.

The prejudicial effect of newspaper reports which disclosed more details than were adduced in evidence was raised as a ground for quashing the conviction. The Court held—

while they should be anxious to avoid the development of a situation where such indiscretions by newspapers would necessarily abort any subsequent criminal trial, a clear warning by the trial judge to the jury to “remove from (their) minds

anything (they) may have heard or may have read in the newspapers” was adequate, without reference to the offending articles, and a more elaborate warning was not called for in view of the strength of the prosecution evidence.

Leopoldo Jones v. Regina Criminal Appeal No. 3 of 1977.

**Canada—
Prince Edward
Island**

Mentally defective young woman—power of Court to authorise sterilization operation

The applicant, mother of a 24-year-old girl “Eve” suffering from extreme expressive aphasia and moderately retarded, sought—

- (a) a declaration that “Eve” was a mentally incompetent pursuant to the provisions of the Mental Health Act;
- (b) that the applicant be appointed the Committee of the person of “Eve”; and
- (c) that the applicant be authorised to consent to a tribal ligation operation (i.e. sterilization) being performed on “Eve”.

The evidence was that little is known of the cause or of any remedy for the condition of expressive aphasia, in which the sufferer is made to communicate her thoughts or concepts. “Eve” was not capable of informed consent, her condition was probably non-inheritable, and she was incapable of using effective alternative means of contraception.

Held—

- (i) the question of consent by or on behalf of a mentally incompetent person appears to be a very grey area where the proposed procedure is only marginally therapeutic or is strictly contraceptive;
- (ii) while “Eve” might not be able to understand and fully appreciate the fulfillment and privilege of procreation, the court must be scrupulously cautious before depriving her of them;
- (iii) an order appointing a person to be the committee of a person in need of guardianship has effect in the words of the Mental Health Act (R.S.P.E.1, 1974, Cap M-9), “in the same manner as a grant to the committee of the person and estate of a lunatic made by and under the order and direction of the Lord Chancellor of England would have done at the time of the passing of the Act 15 Victoria, Chapter 36,”;
- (iv) it appears doubtful whether, in early Victorian times, the direction of the Lord Chancellor would have encompassed sterilization procedures;
- (v) by s. 45 of the Criminal Code, sterilization performed for purely contraceptive purposes is not illegal if (a) it is voluntarily submitted to by the patient, (b) with informed consent, and (c) it can be found to be for the benefit of the patient. *Dame*

Cataford et al v. Docteur Morean (noted at *Canadian Bar Review* Vol LV11, No. 1, p. 89) does not go so far as to say that purely contraceptive sterilization is necessarily legal, even with consent, in all circumstances;

- (vi) the decision to carry out a non-therapeutic operation on a minor or a mentally incompetent is not within the parent's subjective judgment, or the doctor's clinical judgment;
 - (vii) the court was invited to invoke its traditional jurisdiction as *parens patriae*, there being no clear statutory authority for the mother to authorise the proposed surgical procedures, and the fact that there may be no precedent for this should not in itself be a deterrent;
 - (viii) the court should not exclude the possibility of medical advances discovering a remedy for "Eve's" condition, and as the operation would be irreversible, to permit it to be performed could be to deny her the privilege and right to bear children;
 - (ix) regardless of how retarded they may be, the "Eves" were persons with rights which the courts must preserve and protect.
- In the matter of "Eve"* (judgment delivered 14 June 1979: not yet reported).

Gibraltar

Manslaughter – cause of death – trauma and pre-existing natural disease.

The defendant was charged with manslaughter. He admitted having assaulted a fellow seaman, kicking him first in the stomach and then twice or three times on the head. The cause of death was established as rupture of a pre-existing developmental aneurism of the cerebral vessels. The defence accepted that the death was probably the result of the assault but argued that coincidence could not be excluded. The question was whether the probability was sufficient to satisfy the standard of proof.

For the defence, it was argued, relying on *R. v. Summers* (1953) 36 Cr. App. R. 14, that the direction to be put to the jury was that they must feel sure of the guilt of the defendant. The Chief Justice rejected this and, relying on *McGreevy v. D.P.P.* (1972) 57 Cr. App. R. 424, adhered to the standard of proof beyond reasonable doubt. He directed the jury that the law does not require certainty but a very, very high degree of probability, such that while there are or may be other possibilities, it would be unreasonable to take them into account. The jury convicted. An appeal is pending.

R. v. William Cooper (1979: not yet reported).

Articles 19(1)(g), 226 of the Constitution—whether right to receive higher or professional education which is a pre-requisite to practising a trade or profession could be considered to be fundamental right capable of being enforced

The Court has held that—

- (i) the decision of the Supreme Court in the case of *Maneka Gandhi* (AIR 1978 SC 597) would appear to have affixed its seal of approval on the principle that even if a right was not specifically named in the fundamental rights chapter of the Constitution, it may still be fundamental right covered by some clause of its various articles, if it was an integral part of a named fundamental right or partook of the same basic nature and character as an embodied fundamental right, even though it was not enough that the right claimed merely flows or emanates from a named fundamental right or that its existence was necessary in order to make the exercise of the named fundamental right meaningful and effective;
- (ii) if the right to receive higher education or a professional education, which is a pre-requisite to practising a particular trade or profession or to exercise some of the fundamental rights, such as the freedom of expression, be in themselves fundamental rights on the basis of the aforesaid theory, there would be no escape from the conclusion that when the petitioner was sought to be deprived of the opportunity to pursue medical education by an improper order, the impugned action (of cancellation by the University of Delhi of his admission when he had reached the fifth and final year of his studies on the ground that on verification it had been found that he did not belong to the Scheduled Caste and had obtained admission by a false representation) would constitute an infraction of his fundamental right;
- (iii) in the present state of the law, it is not easy to hold either with reference to the theory of emanation or extension or that of the integral part of a named fundamental right to say that any or every denial of an opportunity to carry out professional or technical education or studies would necessarily impinge on the fundamental right to carry on any trade or profession for which such technical or professional study may be a pre-requisite. There can, however, be no doubt in the context of the legal position that obtains today that where the right to pursue professional or technical studies, the completion of which would directly entitle a student to practise a profession, as in the present case, any improper interference in such a pursuit would attract the fundamental right to carry on the profession because the right to carry on the profession would be directly interfered with by such an improper order.

Inder Parkash v. Deputy Commissioner, Delhi, AIR 1979 Delhi 87.

Kenya

Medical practitioner struck off—jurisdiction to entertain appeal

The appellant, a medical practitioner, was struck off the Register following an inquiry by the Medical Practitioners Board. Some four months after the decision of the Board the appellant invoked his statutory right of appeal to the High Court. The relevant provision did not stipulate the time in which the appeal must be made and the appellant brought the matter before the court by way of an application for leave to file the appeal out of time. The trial judge was of the view that the appeal must be made “without unreasonable delay” (s. 58 Interpretation and General Provisions Act) and that in the circumstances the delay was unreasonable. The appeal was dismissed. The appellant appealed against this decision.

The argument before the Court of Appeal was whether that Court had jurisdiction to hear an appeal in the absence of specific statutory authority. Counsel for the respondent sought to argue that the court lacked (criminal) jurisdiction on the basis that the appeal was made not from an appeal decision of the Supreme Court but a decision of the Supreme Court refusing leave to appeal out of time. The court refused to follow an earlier ruling of the East African Court of Appeal which supported counsel’s argument and took the wider view that once a case had been brought before the Supreme Court “the ordinary incidents of the procedure of that court are to attach and also that any general right of appeal from its decisions likewise attaches” (Lord Haldane, L.C. in *National Telephone Company Limited (in Liquidation) and anor v. Her Majesty’s Postmaster General* [1913] A.C. 546). It followed that the court held it had jurisdiction to consider an appeal on the question of the time in which an appeal must be brought from the Medical Board. It was accepted that the appeal must be made without unreasonable delay, but in the event the court held that the delay in the present case was not unreasonable.

Dr. Munene v. Republic (29 May 1978: not yet reported).

Nauru

Precedent—construction of Criminal Code—cause of death—removal of mechanical respirator

The accused was charged with manslaughter contrary to s. 303 of the Criminal Code (First Schedule to the Criminal Code Act 1899 of Queensland (Adopted)). The accused, whilst intoxicated, drove a motor-cycle and in the course of overtaking another vehicle went on to the wrong side of the road and collided with an oncoming motor-cycle driven by the deceased. The deceased suffered extensive head and facial injuries and died four days later when a mechanical respirator was removed preparatory to transferring him to Australia for further treatment.

Convicting the accused the Supreme Court of Nauru held—

- (i) as appeals now lie to the High Court of Australia it was bound by the decisions of that Court on the construction of the Criminal Code;
- (ii) even though removal of the respirator may have contributed to death the injuries sustained in the collision were a cause of death so long as they were “an operating cause and a substantial cause of the death”;
- (iii) the removal of the respirator although unnecessary was not unreasonable and did not break the chain of causation but rather was the same as if treatment had been available but not used.

In so holding, the Court considered and applied the decisions in *Evgeniou v. The Queen* [1964] A.L.J.R. 508; *Thomas Joseph Smith* (1959) 43 Cr. App. R. 121; and *Robert Konrad Blaue* (1975) 61 Cr. App. R. 271. The Court doubted the proposition that if the cessation of treatment had been criminally negligent the chain of causation would have been broken, as being logically unsound, but did not find it necessary to decide the point.

Republic v. Inak Scotty Criminal Case No. 3/1977 (Sup. Ct.).

New Zealand

Abortion – Meaning of “unlawfully” in s. 183 of Crimes Act 1961
 The defendant, a qualified medical practitioner, was acquitted on 12 counts charging that, with intent to procure the miscarriage of the woman concerned, he unlawfully used an instrument on 12 named women contrary to s. 183(1)(b) of the Crimes Act 1961. The trial Judge had directed the jury that the test for whether or not the use of an instrument was unlawful was whether it was necessary to preserve the woman from serious danger to her life or to her physical or health, not being the normal dangers of pregnancy and childbirth. On a case stated, the Crown submitted that the Judge’s direction went too far in that the jury was told that serious danger to physical or mental health was a sufficient justification in itself, irrespective of whether such dangers to health carried with it a real danger of the mother dying or her life being shortened.

Held (Wild CJ dissenting) —

for the purposes of the criminal law, at least in the case of induced miscarriage during the first trimester of pregnancy, a bona fide intention to preserve the health of the mother from a real or substantial risk of serious harm prevented an abortion from being unlawful, and the Judge’s direction was correct in law subject to the qualification that the concluding words “not being the normal dangers of pregnancy and childbirth” were at best redundant and, although there was no misdirection, were better left unsaid.

R. v. Bourne [1939] 1 K.B. 687, *R. v. Newton and Stungo* [1958] Crim L.R. 469 and *R. v. Davidson* [1969] V.R. 667 considered. *R. v. Woolnough* (Court of Appeal, Wellington, 22 July 1976; CA 14/7). Noted at [1976] Butterworths Current Law para 593.

Murder — Intent — Defence of automatism

A few hours after taking LSD accused shot a friend at point blank range with a sawn-off shot gun. On the basis of a pre-existing psychiatric disorder or the ingestion of LSD or both the alternative defences were in effect automatism, or insanity, or incapacity to form the necessary "murderous" intent. The jury found the accused guilty of murder. The summing-up had proceeded on the basis that self-induced intoxication could be a defence to manslaughter, but on appeal it was agreed that the applicability or otherwise in New Zealand of *DPP v. Majewski* [1976] 2 All E.R. 142 be kept open. —

Held, dismissing appeal —

- (i) it may well be that when the evidence in a case is considered as a whole the initial presumption of sanity (s. 23(1) of the Crimes Act 1961) will fail to lead to a clear inference of mens rea, in which event the accused is entitled to be acquitted. But once, sanity being presumed, the necessary intent is clearly to be inferred, then the onus rests upon the accused in terms of s. 23(2) to show that by reason of disease of the mind he did not appreciate either the physical or the moral quality of his acts. If he fails to do this, the provisional presumption of sanity will not have been displaced nor the consequential inference of capacity and intention;
- (ii) on the facts it was unnecessary for the Judge to raise alternative and hypothetical grounds for manslaughter, having on other grounds left such a verdict to the jury;
- (iii) the Judge was justified in commenting upon the failure of the accused to give evidence despite the insanity defence, because an important issue put forward on behalf of accused was that he had acted in some sort of trance and his hearsay explanations to the doctors were given by them in evidence;
- (iv) Crown counsel must not fight for a conviction nor embark upon a course of conduct calculated to persuade the jury to a point of view on the basis of prejudice or emotion. Certain extracts taken from Crown counsel's final address were unfair and objectionable but taken in context with the rest of the address and balanced against the summing-up there was no real risk that they tipped the balance against the appellant.

R. v. Roulston (Court of Appeal, Wellington, 29 July 1976 CA 119/75). Noted at [1976] Butterworths Current Law para. 594.

Witness granted leave to refresh his memory from notes—whether cross-examining counsel entitled to inspect notes

The Supreme Court has held that where a witness uses a document in the witness box to refresh his memory, the document may be seen by the opposing party. The practice of not permitting defence counsel

to look at notes made by prosecution witnesses such as policemen and traffic officers was expressly disapproved.

Brownrigg v. Ministry of Transport [1977] New Zealand Recent Law 159.

Income Tax—donation to Society for the Protection of the Unborn Child—whether charitable donation

The taxpayer claimed as a deduction a donation made to a pressure group actively campaigning for restrictive abortion laws. The Commissioner disallowed it.

On appeal by the taxpayer the Supreme Court held—

- (i) in determining whether the funds of a society were being disbursed for charitable purposes it was relevant to enquire not only as to the stated objects of the society but also as to the manner in which those purposes were being carried out;
- (ii) funds are not disbursed for charitable purposes if the dominant purpose, or one of the main purposes, of a society was political;
- (iii) the professed single object of the society was to prevent changes in the statute law and to encourage further legislative safeguards: this was to frustrate an obvious political object, and so was itself a political object and not a charitable one;
- (iv) nor were the activities charitable as being for the advancement of education, as the advancement of education does not include the indoctrination with the merits of a cause. It is not for the public benefit to take one side in a controversy, even when the advancement of moral thinking is the means adopted to incline public opinion towards the desired direction.

Molloy v. Commissioner of Inland Revenue (1977) 2 T.R.N.Z. 211.

Patents—opposition proceedings

The impact of penicillin was first observed in 1929 by Fleming. Penicillin was isolated during WW2 research and produced biosynthetically until 1959 when Beecham demonstrated their new “semi-synthetic” penicillins. In 1959/60 Beecham and Bristol co-operated and during this time “ampicillin” was discovered; it became the standard against which others were tested. In 1964 Beecham filed UK patent specification 978178; this noted and claimed the desirable properties of the *o*-, *m*- and *p*- hydroxy derivatives of ampicillin when tested against certain micro-organisms in mice. “Amoxycillin” is the *p*-(-)hydroxy derivative of ampicillin. Beecham used it in 1968 in tests on humans and found its absorption qualities exceeded those of ampicillin; a patent

application was filed in the UK in 1968 and in NZ in 1969 (No. 157516). The patent rights for amoxycillin have been contested by Bristol in many countries. Barker J. has recently determined the result in New Zealand in a 109-page judgment.

The judgment commences with an explanation of the role of Professor Ferrier of Victoria University who acted as scientific adviser to the Court (a novelty in the country). Another preliminary discussion is of the nature of opposition proceedings (i.e. under s. 21 of the Patents Act 1953): the questions to be asked include: Is there a prima facie case for the grant of a patent? Does justice require that the application be allowed to proceed to resist invalidity claims in proper revocation proceedings (i.e. under s. 41)?

The two grounds advanced by Bristol in their opposition were (i) prior publication (in patent no. 978178) and (ii) obviousness i.e. no inventive step involved having regard to the state of the art). Both failed and the Commissioner was ordered to seal Beecham's patent.

Barker J. sets out a number of reasons for his conclusion on the prior publication point including the fact that 978178 referred to tests on mice (not necessarily applicable to humans), that 978178 referred to compounds of which amxycillin was a component (which was not made until some time later) and that the English Court of Appeal has recently decided the identical contest in Beecham's favour. On the obviousness point, he considered that the Bristol evidence involved too much hindsight.

Beecham Group Limited v. Bristol-Myers Company, (Supreme Court—Wellington, M 285/78; 20 February 1980) noted in *The Capital Letter* Vol. 3 No. 6 (87).

Misuse of drugs—whether evidence of propensity admissible

This decision raised important issues relating to the admissibility of evidence tending to establish the propensity of an accused in relation to the class of offence charged. The applicant was found guilty by a jury on the charge of importing cannabis resin into New Zealand. Part of the evidence upon which the Crown relied was evidence of propensity; that is, evidence as to the appellant's wider involvement in the drug scene. The particular evidence to which objection was made was categorised as follows—

- (a) two sets of scales found at the applicant's house which on scientific examination revealed minute traces of heroin,
- (b) that the applicant was a drug addict,
- (c) that morphine had been found at the applicant's house, and
- (d) that the applicant disputed the value of the cannabis resin estimated by the Police and used certain colloquial phrases, often attributed to drug users, to describe the various controlled drugs.

Following the rule laid down by *R. v. Te One* [1976] 2 N.Z.L.R. 510, 514; that evidence must be excluded if it can do no more than show that the defendant is likely to have committed the crime charged, the Court ruled that—

- (i) the relevance of the above-mentioned evidence to the charge was limited to propensity. Its only relevance was to indicate that because of the applicant's involvement in the drug scene he was the type of person who could be expected to commit this type of offence;
- (ii) the evidence should not have been admitted by the trial judge on the basis that its prejudicial effect outweighed its probative value. The cumulative effect of the evidence was to create a real risk of a miscarriage of justice.

The Court declined to order a new trial on the basis that the remaining evidence adduced by the Crown amounted to no more than a serious suspicion that the applicant had been a party to the importation of cannabis resin and was therefore insufficient to place before a jury. The appellant was accordingly acquitted.

R. v. Jennings [1979] N.Z. Recent Law 339.

Swaziland

Disposal of a child's body—intent to conceal birth—whether death before or after disposal material

The accused had pleaded guilty in the Magistrate's Court of having contravened s. 2(1) of the Concealment of Birth Act 1943 (No. 5 of 1943), but the matter thereafter came to the High Court on review when the Chief Justice directed that it be set down for argument. It appeared from the recorded evidence that the accused had given birth to a child which she dumped in her toilet, from where the child was removed to hospital but who died about three days later from atelectasis of the lung. Section 2 of the Swaziland Act is in practically identical terms with s. 113 of the South African General Law Amendment Act 1935 (No. 46 of 1935). The section under which the accused was convicted on her plea of guilty makes it an offence for a person to dispose of the body of any child with intent to conceal the fact of its birth "whether such child died before, during or after birth". In the case of *R. v. Lequila* (1946) E.D.L. 8 Gardner J. on review, not argued before him by Counsel, held that there could be no conviction unless what was disposed of was the dead body of the child. In *R. v. Oliphant* (1950) (1) S.A. 48 de Beer J. P. stated that the relevant section "quite clearly envisages the disposal of a dead body and this is an essential element of the crime which should have been alleged".

The Chief Justice Mr. Justice C. J. M. Nathan, however, differed from the decisions in these cases.

Held—

- (i) the evil with which the legislature is concerned is the disposal

of the body of a child with intent to conceal the fact of its birth, and should be just as much an offence if the child is alive as if it is dead;

- (ii) in the light of s. 2(3) of the Act which is to the effect that “a person may be convicted under subsection (1) although it has not been proved that the child in question died before its body was disposed of” (a similar provision appears in the South African section), it was unnecessary to prove that the child was dead before the body was disposed of and that the subsection indicated that it could just as well be a live body.

The conviction was accordingly confirmed.

Rex v. S. M. Nkambule (Review Case No. 135 of 1976).

Professional negligence – application of doctrine of res ipsa loquitur – standard of proof in cases of professional negligence

The respondent sued through his next friend for damage to his eye during a forceps delivery at birth. The mother had been in labour for some time and the midwife, realizing that there were complications, called in a doctor, the second appellant. He discovered that the foetus was in the right occipito–posterior position and that there was foetal distress. He tried to rotate the head to the occipito-anterior position but could not do so and hence he manouvered it to the straight occipital position. He inserted the forceps over the head and delivered the baby by traction. The child, however, sustained injury to its eye which was treated during ten days the mother and the child remained in the hospital. The baby was later taken to a Kampala specialist but it was discovered that it was too late to save the sight of the eye.

The High Court held that the doctor had been negligent in not checking the position of the forceps or applying them improperly, and that the principle of res ipsa loquitur applied. The hospital was found negligent in not referring the child to an eye specialist in time. The High Court also accepted a proposition of Lord Denning in *Hucks v. Cole* [1968] New L.J. 469 to the effect that standard of proof in a case charging professional negligence against a medical man was higher than in other cases.

On appeal to the Court of Appeal for East Africa, it was held –

- (i) the court had never come across a case where the doctrine of res ipsa loquitur had been applied to a mistake or error of judgment by a surgeon in a difficult and tricky operation as the forceps delivery of a baby. It would be placing an impossible burden on a surgeon if the doctrine applied and the surgeon, in any operation not entirely successful, would have the onus of justifying every moment in operation;
- (ii) the evidence had established what had occurred and therefore the doctrine of res ipsa loquitur could not apply;

- (iii) on the facts it had not been shown that the doctor was negligent;
- (iv) the injury to the eye was caused by the operation and not by any failure on the part of the hospital to refer the child to an eye specialist;
- (v) the burden of proving negligence against a medical or professional man was not higher than in other cases – the burden being to prove that damage was caused by negligence and not a question of misadventure and that burden must be discharged on a preponderance of evidence.

Pope John's Hospital and another v. Kasozi [1974] E.A. 221; [1974] H.C.B. 49.

United Kingdom Cannabis – definition – whether leaves and stalks containing cannabis resin included in definition

Section 37(1) of the Misuse of Drugs Act 1971 defines cannabis as “the flowering or fruiting tops of any plant of the genus of *cannabis* from which the resin has not been extracted.” Held by the Court of Appeal (quashing convictions for possession of cannabis leaves and stalks containing cannabis resin) –

- (i) the words “flowering and fruiting tops” were words of limitation indicating a part and not the whole of the plant above the ground, so that the leaves and stalks were not necessarily within the definition even though they contained cannabis resin;
- (ii) in the absence of evidence that they were parts of the flowering or fruiting tops the convictions would be quashed.

R. v. Goodchild [1977] 1 W.L.R. 473.

Written statements by experts—preferable to have fewer experts give evidence on oath

In a case alleging unlawful possession of a drug the prosecution tendered a large number of statements by experts. On appeal the Court of Appeal observed that this was not always a satisfactory approach. The judge requires the assistance of watching the witness, listening to him and observing his demeanour as much as when dealing with a technical question as when dealing with a running-down accident. It would have been better had the judge had perhaps two or even three experts who could be cross-examined, who could explain matters to assist him if possible.

R. v. Goodchild (No. 2) [1977] 1 W.L.R. 1213.

Proceedings for personal injuries—order for production of hospital records—whether jurisdiction to limit production to medical advisers

By s. 32(1) of the Administration of Justice Act 1970—

“On the application of a party to any proceedings in which a claim in respect of personal injuries is made, the High Court shall have power to order a person who is not a party to the proceedings and who appears to the court to be likely to have in his possession, custody or power any documents which are relevant to an issue arising out of that claim (b) to produce to the applicant such of those documents as are in his possession, custody or power”.

The hospital records relating to the treatment of the respondent, who was plaintiff in an action arising out of an accident, were in the custody of the appellants. The respondent, the defendant in the action, applied under s. 32(1) of the Act for an order that the appellants should produce them to him, and an order was made for production “to the legal advisers of the defendants”. On appeal by the appellants, the Court of Appeal (Northern Ireland) refused to vary the order so as to direct production “to medical advisers nominated by the defendant and the appellant respectively”.

On appeal, the House of Lords affirmed the decision of the Court of Appeal, and held that the court had no discretion to order the doing of anything different from that which alone was required by s. 32(1), namely, to produce the documents to the applicant, which in the ordinary course of litigation would be carried out by production to his solicitor. *Dunning v. United Liverpool Hospitals' Board of Governors* [1973] 1 W.L.R. 586; *Davidson v. Lloyd Aircraft Services Ltd.* [1974] 1 W.L.R. 1042; and *Deistung v. South West Metropolitan Regional Hospital Board* [1975] 1 W.L.R. 213 (C.A.) overruled.

McIvor v. Southern Health and Social Services Board [1978] 1 W.L.R. 757 (H.L.).

Abortion—injunction—whether husband can restrain wife from seeking abortion

A husband sought an injunction to restrain his wife, and a charitable organisation, from causing or permitting an abortion to be carried out upon the wife without the husband's consent.

Held that –

since an unborn child has no rights of its own and a father had no rights at common law over his illegitimate child, the husband's right to apply for the injunction had to be on the basis that he had the status of husband; that the courts had never exercised jurisdiction to control personal relationships in marriage and, in the absence of the right to be consulted under the Abortion Act 1967, the husband had no rights enforceable in law or in equity to prevent his wife from having an abortion or to stop the doctors

carrying out the abortion, which was lawful under the Act of 1967.
Per curiam. It would be quite impossible for the courts to supervise the operation of the Abortion Act 1967. The great social responsibility is firmly placed by law upon the shoulders of the medical profession.

Paton v. British Pregnancy Advisory Service Trustees and another [1978] 3 W.L.R. 687.

Dentist—professional misconduct—whether assessor’s advice to disciplinary committee misdirection—whether sentence wrong or unjustified

The appellant a registered dentist, permitted unqualified staff to insert filling materials into the teeth of a patient. He was charged with having been guilty of infamous or disgraceful conduct in a professional respect. At the hearing before the Disciplinary Committee of the General Dental Council, the legal assessor advised the committee that “infamous conduct” meant “serious conduct in a professional respect,” and that in deciding whether the conduct had been serious the committee should apply the ordinary standard of the profession, and not a special standard greater than was ordinarily to be expected. The committee found the appellant guilty of the charge and pursuant to s. 25 (1) (b) of the Dentists Act 1957, ordered his name to be erased from the register.

On appeal by the appellant to the Judicial Committee against the finding of guilt, on the ground, inter alia, that the assessor had misdirected the Disciplinary Committee by making no distinction between negligent and infamous or disgraceful conduct, and against the sentence, it was held, dismissing the appeal, that—

- (i) a dentist could only be found guilty of infamous or disgraceful conduct in a professional respect if the conduct was such as to deserve the strongest reprobation: that it was for the committee to determine whether in law and in fact the appellant had been guilty of such conduct and, since the committee had been reminded of several decisions which accurately stated the law, the advice tendered by the assessor had not had sufficient significance to the result to invalidate the committee’s decision and, therefore, it could not be a ground for quashing the finding of guilt.

Dicta of Lord Jenkins in *Felix v. General Dental Council* [1960] A.C. 704, 720, (P.C.) and Lord Guest in *Sivarajah v. General Medical Council* [1964] 1 W.L.R. 112, 117 (P.C.) applied;

Per curiam. The Judicial Committee regard Lord Jenkins’ exposition in *Felix v. General Dental Council* [1960] A.C. 704, 720, as so valuable that, without going so far as to say that his

words should invariably be cited in every disciplinary case, they think that to do so would be a commendable course.

- (ii) since the Disciplinary Committee was in the best position to weigh the seriousness of professional misconduct, the Judicial Committee would only interfere with the exercise by the Disciplinary Committee of its discretion as to sentence if the sentence was wrong or unjustified: and that, although the sentence of erasure passed on the appellant was undoubtedly severe, it could not be said to be wrong or unjustified.

Dicta of Lord Upjohn in *McCoan v. General Medical Council* [1964] 1 W.L.R. 1107, 1112, (P.C.) applied.

Per curiam. The penalty provisions of the Dentists Act 1957 need to be reconsidered in the light of the fact that unlike the corresponding statutory provisions applicable to doctors the Act has not been amended to permit the imposition of the milder penalty of suspension for a period not longer than 12 months in cases involving what may properly be regarded as the less serious breaches of the professional code.

McEniff v. General Dental Council [1980] 1 W.L.R. 328 (P.C.).

Damages for personal injuries—medical examination—conditional agreement

M claimed damages from R for personal injuries. R required M to submit to a medical examination and M agreed on condition that he received a copy of the report. R applied to stay until the examination contending M was not entitled to impose the condition. On appeal, the judge granted the stay holding that the plaintiff was not entitled to impose the condition (R.S.C., Ord. 38, r. 37).

On appeal by M, the Court of Appeal, dismissing the appeal, held that in view of the provisions of R.S.C., Ord. 38, r. 37, a plaintiff in an action for personal injuries was no longer entitled, as a condition of agreeing to submit to a medical examination at the instance of a defendant, to insist upon the disclosure to him of any resulting medical report.

Mearity v. D. J. Ryan & Sons Ltd. [1980] 1 W.L.R. 1237 (C.A.).

Restraint of trade—medical practitioner—whether restriction against public policy

Section 35 of the National Health Service Act 1946 re-enacted in the National Health Service Act 1977 provides—

- (1) Where the name of any medical practitioner is, on the appointed day or at any time thereafter, entered on any list of medical practitioners undertaking to provide general medical services, it shall be unlawful subsequently to sell the goodwill or any part of the goodwill of the medical practice of that medical practitioner . . .
- (2) Any person who sells or buys the goodwill or any part of the goodwill of a medical practice which it is unlawful to sell by virtue of the last foregoing subsection, shall be guilty for an offence . . .

- (4) Where in pursuance of any partnership agreement between medical practitioners (a) any valuable consideration, other than the performance of services in the partnership business, is given by a partner or proposed partner as consideration for his being taken into the partnership . . . there shall be deemed for the purposes of this section to have been a sale of the goodwill or part of the goodwill of the practice of any partner to whom . . . the consideration or any part thereof is given . . .

When T joined H in partnership as a general practitioner the agreement contained a clause providing for a five-year bar on T practising within seven miles of the partnership in the event of his leaving. Following the retirement of the third partner and consequent dissolution of the partnership H sought to persuade T to sign a new agreement incorporating a similar term. T refused and H gave notice dissolving the partnership. T joined another local practice and H issued a writ, claiming, *inter alia*, an injunction.

The Court, dismissing the action, held that—

- (i) the purported restriction was void as offending against public policy by preventing a doctor giving care to patients which he was lawfully obliged to give;
- (ii) the restriction was further unenforceable upon the usual contractual criteria as being unreasonably wide;
- (iii) s. 35 of the 1946 Act, re-enacted in the 1977 Act, clearly and unambiguously operated to render the restriction unenforceable.

Hensman v. Traill (The Times newspaper: 22 October 1980).

Abortions—whether nurses' participation in termination of pregnancy lawful

The Court of Appeal allowed an appeal by the Royal College of Nursing from the refusal of Mr. Justice Woolf to grant them a declaration that a statement as to the legality of the role of nurses in the termination of pregnancy by medical intervention contained in a letter and annexes thereto dated 21 February 1980, and circulated by the Department of Health and Social Security, was wrong in law. Giving his reasons for so holding he said, "Where a nurse participates in the process of abortion by medical induction, the treatment is nevertheless conducted by a registered medical practitioner as long as the process is initiated by a registered medical practitioner who remains responsible throughout for its conduct and control in the sense that any actions needed to bring it to a conclusion are done by appropriately skilled staff acting on his specific instructions, and he or another registered medical practitioner is available to be called if required."

Section 1(1) of the Abortion Act provides—

"...a person shall not be guilty of an offence under the law relating to abortion when a pregnancy is terminated by a registered medical practitioner..."

The Court of Appeal held that—

- (i) under the Abortion Act 1967, an abortion must be carried out by a registered medical practitioner;
- (ii) it is not sufficient that it is carried out by a qualified nurse or midwife in accordance with his written instructions;

(iii) accordingly, in the case of an abortion by means of medical induction the whole of the process of administering the abortifacient drugs must be carried out by the practitioner personally.

The Court also ruled that a letter sent by the department to regional medical and nursing officers, with copies to the boards of governors of the specialist postgraduate teaching hospitals, was an attempt to amend the law by means of a departmental circular.

Note: Consequently, the advice to doctors, nurses and midwives about the role of nurses involved in abortions, contained in Circular CMO(80)(2) issued February 1980, is to be withdrawn, though it is still possible that the department may appeal to the House of Lords.

Royal College of Nursing of the United Kingdom v. Department of Health and Social Security (The Times newspaper: 10 November 1980).

Law Reform

Australia

Alcohol, drugs and driving

The Law Reform Commission of Australia has now issued a comprehensive report entitled "Alcohol, Drugs and Driving" (Report No. 4, Australian Government Publishing Service, Canberra) which was referred to at (1976) 2 C.L.B. 131. The Attorney-General's reference to the Commission required it to report on a number of vital questions affecting the appropriate legislative means for controlling the use of motor vehicles by those whose ability to drive is impaired by alcohol or other drugs. The report examines the current law in the Capital Territory in relation to that of other states and of other countries, and criticisms of the law with special reference to judicial decisions. It attaches a draft Bill. Among its recommendations are –

- (i) the existing offence of driving a motor vehicle with a blood alcohol concentration equal to or exceeding the prescribed level should be abolished;
- (ii) in substitution for the above, it should be an offence to drive a motor vehicle, if the concentration of alcohol in the blood of the driver, as recorded by an approved breath analysing instrument or as determined by a blood test is, *at the time the analysis is made*, equal to or more than the prescribed concentration;
- (iii) reference to "driving" a motor vehicle or to the "driver" of a motor vehicle should include reference to a person who has started or has attempted to start the engine of a motor vehicle or who has put or has attempted to put in motion a motor vehicle or to a person who is in and in charge of a motor vehicle;
- (iv) it should be a defence to a charge arising out of being "in charge of" a motor vehicle for the person charged to establish that he had not started or put the vehicle in motion or attempted to do so, and he did not intend to drive until a time when his blood alcohol concentration would be less than the prescribed concentration;
- (v) the prescribed concentration of alcohol in the blood for the purposes of the Ordinance should remain at 80 milligrams (or 0.08 grams of alcohol) per 100 millilitres of blood; by reason of (ii) this may in certain cases amount to a de facto lowering of the limit;

- (vi) the offence of “driving under the influence” should be retained but no qualification should be expressed such as would require a particular degree of impairment;
- (vii) it should be an offence for a person to drive a motor vehicle while under the influence of alcohol or of a drug. The gravamen of the offence should be “driving . . . under the influence”, whether of alcohol or of another drug or of alcohol and a drug. The prosecution should not be required to elect between proceeding upon one or other of these species of the offence, although no person should be convicted of more than one such offence arising out of the same events;
- (viii) a member of the police force should have power to require a person to undergo a screening test in accordance with his directions if the person is or shortly before was the driver of a motor vehicle on a public street or in a public place and the member of the police force has reasonable cause to suspect that the person has alcohol or a drug in his body;
- (ix) where a motor vehicle has been involved in an accident on a public street or in a public place, a member of the police force should have power to require a person to undergo a screening test in accordance with his directions where he has reasonable cause to suspect that the person was the driver of the motor vehicle at the time of the accident or, if he is in doubt as to who was the driver, if he has reasonable cause to suspect that the person was in the vehicle at the time;
- (x) where a member of the police force has reasonable cause to suspect that a person may have committed an offence of culpable driving, he should have power to require that person to undergo a screening test in accordance with his directions. This police power should not be limited to occurrences on a public street or public place;
- (xi) a member of the police force should not require a person to submit to a screening test –
 - (a) if more than two hours have elapsed since the person was the driver of the motor vehicle;
 - (b) if more than two hours have elapsed since the accident occurred or, if the person is taken to hospital, since his arrival at the hospital; or
 - (c) in the case of a member of the police force attending at the scene of an accident who is in doubt as to the time of the accident, if more than two hours have elapsed after the person was found or, if he is taken to hospital, after his arrival at the hospital.
- (xii) a member of the Police Force should not require a person

- to submit to a screening test –
- (a) if it appears by reason of injury or otherwise that it would be dangerous to do so;
 - (b) in the case of a person in hospital, if the attending medical practitioner after being notified by the member certifies in writing his opinion that compliance with the requirement would be detrimental to the person's medical condition; or
 - (c) in the case of a person at his place of abode, unless he was, or is suspected on reasonable grounds to have been, the driver of a motor vehicle involved in an accident on a public street or in a public place, or to have committed an offence of culpable driving, or following pursuit of the person's vehicle by the police if the member has reasonable cause to suspect that the person has alcohol in his body;
- (xiii) the installation of "self assessment" facilities is not recommended;
- (xiv) the primary method of ascertaining the presence of alcohol in the body of a suspected person should be by breath analysis, conducted by means of an instrument approved by the Minister as an approved breath analysing instrument. Approval of instruments should be notified in the "Gazette";
- (xv) only an approved operator should be empowered to carry out a breath analysis. An "approved operator" should be a member of the police force authorised by the Commissioner of Police to carry out breath analysis;
- (xvi) wherever practicable, the model 1000 Breathalyzer should be used, as it contains a facility to print-out the results of tests conducted by it. Other breath analysing instruments exist and there has been insufficient time to complete a comparative scientific evaluation of them;
- (xvii) police authorities should not in future, as they are at present, be limited by the terms of the Ordinance itself to the use of particular breath analysing instruments. Such instruments are constantly being improved. It should be possible by amendment of the regulations to take advantage of new instruments as they are developed and approved;
- (xviii) a member of the police force should be empowered to require a person to submit to breath analysis by means of an approved breath analysing instrument where –
- (a) the person has undergone a screening test which indicates that the concentration of alcohol in his blood is equal to or more than the prescribed concentration;

- (b) the person who has been required to undergo a screening test, has refused to do so; or
 - (c) the person has failed to undergo the screening test in accordance with the directions of the member of the police force.
- (xix) for the purpose of carrying out such breath analysis, a member of the police force should be empowered to detain the person and, if he detains him, to take him or cause him to be taken as soon as possible to a police station or some other convenient place for the purpose of submission to breath analysis;
 - (xx) a member of the police force detaining or taking a person as above should not be liable to action by reason only of such detention or taking;
 - (xxi) regulation 29 of the Motor Traffic Regulations should be amended to enable any member of the police force to take charge of the vehicle of a person detained as above and to put it in a place of safety until claimed by the owner;
 - (xxii) only an approved operator should be empowered to carry out a breath analysis. An "approved operator" should be a member of the police force authorised by the Commissioner of Police to carry out breath analysis;
 - (xxiii) an approved operator carrying out breath analysis should take all steps that are reasonably practicable to ensure that it is not readily apparent to members of the public that the analysis is being carried out;
 - (xxiv) a member of the police force should not require a person to submit breath analysis after the elapse of the times or in the circumstances referred to in paras (xi) and (xii) above and, if required, the breath analysis should be completed within the relevant time limit;
 - (xxv) a person who has been required to submit to breath analysis should not be entitled to request a second breath analysis;
 - (xxvi) as soon as practicable after the breath analysis has been carried out, the approved operator should give to the person tested a written statement showing the results of the test and such other particulars as are required by the regulations. This should contain a statement of the consequences of the test and of the person's rights. If the model 1000 Breathalyzer of similar breath analysing instrument with print-out facility is used, a triplicate serialised certificate should be used. The regulations should provide that one copy of the print-out should be given to the person tested, together with the statement in writing referred to above;
 - (xxvii) if a breath analysing instrument with the facility of print-

- out is used, the approved operator should give the person tested a statement containing the same information as that contained in the print-out;
- (xxviii) the formalities to be observed in the carrying out of breath analysis should be contained in the regulations and the approved operator should comply with the procedures specified in the regulations for the particular breath analysing instrument used by him;
 - (xxix) the option of a blood test in lieu of or following unsuccessful completion of a screening test or breath analysis is not recommended;
 - (xxx) blood tests should be available to ascertain the blood alcohol concentration of a person only in the limited circumstances referred to below;
 - (xxxi) a member of the police force should be empowered to require a person to give a sample of his blood to enable a blood test to be carried out only where that person would, but for disqualifying circumstances otherwise be liable to undergo a screening test or to submit to breath analysis;
 - (xxxii) the disqualifying circumstances in which a person may be required to give a sample of his blood instead of a sample of breath should be –
 - (a) where it appears to the member of the police force by reason of injury or otherwise that it would be dangerous for the person to undergo a screening test or breath analysis;
 - (b) where a person is in hospital and the attending medical practitioner after being notified by a member of the police force certifies in writing that a screening test or breath analysis would be detrimental to the person's medical condition; or
 - (c) breath analysis equipment is not available or is not operating;
 - (xxxiii) a medical practitioner should not take a blood sample –
 - (a) if in his opinion it would be detrimental to the medical condition of the person for him to do so;
 - (b) after the expiration of the period of two hours following arrival of that person at the hospital; or
 - (c) if the person required to submit to the taking of a sample of his blood objects to doing so and persists in his objection after being informed that such objection may constitute an offence unless based on religious or other conscientious grounds or on medical grounds;
 - (xxxiv) the introduction of universal blood tests for persons admitted to hospital following motor vehicle accidents is not recommended;

(xxxv) where a person has been required to undergo a screening test or to submit to breath analysis and has been arrested on a charge of driving under the influence or of culpable driving and a member of the police force has reasonable cause to suspect –

(a) the presence of a drug other than alcohol in that person's body; or

(b) that the behaviour of a person does not arise or does not wholly arise from the presence of alcohol in his body

that a member of the police force should be empowered to require that person to submit to a medical examination for the purpose of ascertaining whether his condition is caused or is contributed to by the presence in his body of a drug other than alcohol;

(xxxvi) it should be an offence for a person to refuse or fail to –

(a) submit to breath analysis; or

(b) provide a blood or other body sample for analysis; or

(c) submit to a medical examination

in accordance with the directions of a member of the police force or medical practitioner as the case may be. It should be a defence to a charge of refusal or failure under (b) or (c) above if the person establishes that his failure or refusal is based on religious or other conscientious grounds or on medical grounds;

(xxxvii) except in exceptional circumstances, for example, where a screening test device is not immediately available, a member of the police force should not be entitled to arrest a person without warrant whom he suspects to be guilty of the offence of driving under the influence unless and until he has required that person to undergo a screening test;

(xxxviii) provision should be made to allow the admission of certain certificates in court proceedings, to avoid the necessity for the attendance in court of certain witnesses, unless they are specifically required to attend by notice given by the accused person;

(xxxix) a certificate purporting to be signed to a member of the police force stating that a person named therein was required to provide a sample of his breath for breath analysis and that the person refused or failed to provide such a sample should be prima facie evidence of the matters stated in the certificate and of the facts on which such matters are based;

(xl) a certificate purporting to be signed by a member of the police force stating that a person has been submitted to breath analysis and stating compliance with the formalities

of and the result of the breath analysis should be prima facie evidence of the matters stated therein and of the facts on which such matters are based;

- (xli) the following certificates purporting to be signed by the persons stated therein should be prima facie evidence of the matters so certified and of the facts on which they are based –
 - (a) a certificate by the Commissioner of Police approving a breath analysis operator;
 - (b) a certificate by a person designated in the regulations as to matters permitted by the regulations to be stated by a certificate;
 - (c) a certificate by a medical practitioner as to the formalities associated with the taking of a sample of blood or other body sample; and
 - (d) a certificate by an approved analyst as to the analysis and the results of tests;
- (xlii) the accused person should be entitled by giving notice to require the attendance at court of any person by whom a certificate has been given, for the purpose of giving evidence orally and in such a case the persons required to attend should give evidence orally but the certificate should be admissible as evidence and should have such probative value as the court determines, consistent with the other evidence called;
- (xliii) in general, heavier fines should be available for offences against the Ordinance; existing provisions for the loss of the driver's licence should be retained and expanded; imprisonment should be available as a penalty of last resort only;
- (xliv) the existing "two-tiered" system of penalties based upon different levels of blood alcohol concentrations should be abolished. In the case of fines and imprisonment, the Ordinance should state only the maximum penalties that may be imposed;
- (xlv) in addition to the pecuniary penalties and/or imprisonment the court should upon conviction be required to take certain steps in relation to the driver's licence. In the case of a first offence against the breath analysis provisions of the Ordinance, the suspension should be for a minimum period of three months. In the case of a "first offender" convicted of driving under the influence, the suspension should be disqualified from holding a driving licence;
- (xlvi) where a person's driving licence has been cancelled it should be necessary for him to apply to a court for restoration of the licence. The court's attention should be drawn

- to appropriate criteria to be considered before the licence is restored;
- (xlvii) on any such application for restoration of a cancelled licence, the court should hear any evidence of the police, the applicant, the Registrar of Motor Vehicles and any medical evidence to assist it to judge whether the driving licence should be restored, having regard to –
 - (a) the period of disqualification;
 - (b) the conduct of the applicant during such period, especially in relation to the consumption of alcohol or drugs;
 - (c) the physical and mental condition of the applicant;
 - (d) any evidence of medical or other rehabilitation treatment undergone by the applicant; and
 - (e) the effect of restoration of a driving licence on the safety of the applicant and the public.
 - (xlviii) upon an application for the reissue of a cancelled licence the court should be entitled to –
 - (a) restore the licence;
 - (b) dismiss the application; or
 - (c) restore the licence on such terms and conditions and for such period as it thinks fit.
 - (xlix) in addition to the conventional penalties of fine, imprisonment and suspension or cancellation of the driver's licence, courts should have available to them alternative counter-measures designed to cope specifically with the problem of drivers whose driving is impaired by their consumption of alcohol or other drugs. Treatment, rehabilitation and education programmes should be initiated and developed;
 - (i) there is an urgent need for the establishment and development in the Australian Capital Territory of programmes for the treatment, rehabilitation and education of offenders. As a start, sufficient funds should be made available for the implementation of a type of scheme outlined to the Commission and detailed in the report;
 - (ii) the introduction of the new Ordinance should be accompanied by a campaign to alert and educate drivers concerning the dangers caused by the consumption of alcohol and drugs and the provisions of the new laws designed to deal with these dangers;
 - (iii) the training of learner drivers should include specific information concerning the effects of alcohol and drugs on driving and the relevant provisions of the Ordinance. Questions on these matters should be included as a matter of course in tests conducted for the grant of a driving licence;
 - (iiii) consideration should be given to the reduction or total

prohibition of media advertisements for alcohol or such advertisements should be accompanied by warnings of the dangers involved in the consumption of alcohol;

- (liv) in addition to the need for research, there is a need for continuing education of the public and of the medical and pharmaceutical professions concerning the effects of drugs on driving, particularly drugs prescribed by medical practitioners and supplied over the counter. Research into the effects of such drugs on and public education concerning such effects should continue and funds should be made available for that purpose.

The Minister for the Capital Territory has announced that the Australian Government has generally accepted the recommendations made by the Australian Law Reform Commission, although it has some reservations about the Commission's criticisms of random breath testing.

Human tissue transplants

The Australian Law Reform Commission has issued its Working Paper No. 5, setting out tentative views for reform in the area of human tissue transplants, the practice and teaching of anatomy, and the conduct of non-coronial autopsies (the practice of the last-named being a subject generally not regulated by statute in Australia). Its provisional proposal are that –

- (i) the public interest in Australia would be well served by clear statutory rules dealing with transplantation of tissue from both living and dead persons. The common law, to which resort may often be made in the absence of statute is simply not equipped to provide solutions to the important legal problems created by transplantation;
- (ii) the giving of tissue by a living adult person should be specifically permitted by statute, under certain conditions involving proper advice and the capacity to make an informed decision. The giving of tissue by minors and other "incompetents" should as a general rule, be prohibited despite parental wishes. This prohibition should relate mainly to non-regenerative tissue. There is, however, a case for establishing a machinery (e.g. some form of tribunal) for dealing with exceptional cases where there is a high expectation of success and it could be in the *donor's* interest to give tissue (e.g. identical twins);
- (iii) the characteristics of transplant procedures for certain organs, e.g. kidney, heart, and liver, necessitate a more accurate diagnosis of death than has been needed in the past. This particularly applies to cases of irreversible coma caused by

- permanent cessation of brain function where the patient's body is sustained by support machinery. The Commission proposes that legislation be introduced authorizing or permitting death to be diagnosed by reference to permanent cessation of brain function;
- (iv) greater aid to sick and dying persons who could be cured or saved by human tissue transplants would be possible if all dead bodies were available for removal of needed tissue. Some countries (e.g. France, and Hungary) have laws to this effect. Having insufficient evidence at the present stage of its Inquiry, that the Australian public is prepared to countenance such a law, the Commission currently proposes that the following conditions should apply to the removal of tissue from dead persons for transplant –
 - (a) removal may occur if the person has expressed a request or consent to that effect. Such a request or consent will prevail over the view of relatives,
 - (b) the request or consent may be expressed either orally or in writing,
 - (c) the request or consent may be withdrawn at any time before death,
 - (d) if there is no knowledge of a wish, request, consent, or objection by the deceased, a hospital may remove tissue for transplant after first inquiring for objections from the spouse. In the absence of a spouse, inquiry should be made of close relatives (parents, children, brothers, sisters). The obligation to inquire should cease when the first such person indicates "no objection". If an objection from any close relative is made, removal may not occur,
 - (e) coroners' powers to give consent to removal of tissue for transplant should be modernised to enable pre-death informal communication, along lines pioneered in Queensland;
 - (v) there appears to be no special reason for specific legislation directly regulating recipients of human tissue for transplant except possibly in relation to recipients who are minors or otherwise lacking in legal capacity. On balance, the Commission considers that legislation is not called for even for recipients of this lastmentioned class;
 - (vi) the Commission does not recommend the establishment of an Australian national register of donors of human tissue for transplant. However, there are good reasons for the creation and continuation of systems such as existing donor card systems, and the endorsement of driving licences to indicate willingness to give such tissue;
 - (vi) the sale by and remuneration of donors of human tissue should be forbidden. Special government compensation for a living

- donor who may lose income because of his gift of tissue, or the indemnification of such a person against medical expenses, present or future, is not required in Australia in view of existing social service, and medical benefits;
- (vii) disclosure of personal information about a donor or recipient of transplanted human tissue or his family (including his identity) should be forbidden except with the consent of the person himself;
 - (viii) specific protection should be extended to the medical profession and persons involved in transplantation against damages for any act done in good faith and without negligence;
 - (ix) anatomy legislation would benefit from amendment to reflect modern conditions. The same principles which apply to consent to use cadaver tissue for transplant could, with advantage, apply to the use of a dead body for anatomy teaching and practice. Legislation should restrict anatomy teaching and practice to authorized schools, and teachers and practitioners should be licensed. Registered medical practitioners should be automatically licensed. Legislation should clearly describe conditions of removal of a dead body to an anatomy school, and related record-keeping. Burial (and cremation) after completion of the medical purposes should also be regulated. In view of the requirements of modern medicine and medical education, a right, by agreement, to extend the time for burial should be created. New legislation for the A.C.T. is required, and should include the principles described above;
 - (x) hospital autopsies are a valuable educative practice, serving to uphold high medical standards of hospitals and medical practitioners. The primary function of autopsy is to confirm or determine with accuracy, the cause of death. There is little legislation in Australia on this subject. The Commission proposes the adoption of the same principles for consent to autopsy as for anatomical examination. Autopsy should be performed promptly and with due regard for the dignity of the deceased and the feelings of his relatives. A regulation-making power should be created, authorizing the retention and use for therapeutic or scientific purposes of prescribed tissue available during autopsy, when the public interest is thereby served.

Publications and the protection of privacy

The Law Reform Commission of Australia has published Discussion Paper No. 2: "Privacy and Publication—Proposals for Protection". The Paper explains why it favours the separate consideration of defamation on the one hand [see Discussion Paper No. 1 noted in

(1977) 3 C.L.B. 478] and publication privacy on the other, but recognises that it might be undesirable to have a new defamation law without simultaneous privacy protection in the realm of publication. It suggests that the issue of publication privacy should be considered as an issue separate from other privacy questions and dealt with as such in legislation although, for convenience, defamation and publication privacy might be dealt with in separate parts of a single new statute.

The following is a brief summary of some of the Commission's tentative views—

- (i) the existing legal gaps are such as to require legislation to grant some protection against publications which infringe privacy;
- (ii) the creation of a general right of privacy is undesirable, at least at this stage. The time lapse before general concepts may be satisfactorily refined is unpredictable but likely to be great. The financial stakes in privacy actions are not so high as to encourage appeals. In the meantime there is a real risk of undue interference with freedom of speech. Any restrictions on expression should be by precise, readily understandable, rules;
- (iii) the restrictions presently appropriate should be only those which clearly pertain to the private realm. The legislation should be tightly drafted so as to catch only those cases where privacy is necessarily invaded. Debatable areas should be left unrestricted. This will necessarily mean that some people will regard the suggested restrictions as inadequate; indeed they will not cover all of the examples cited in the Paper;
- (iv) it follows that many objectionable publications will not be prohibited by legal restriction. Editorial responsibility will remain, to be exercised in accordance with individual judgment of legitimate public interest and canons of good taste. If experience shows that the particular restrictions now proposed are too narrow, and that editors insensitively exercise discretion, further legislation may be required;
- (v) publication restrictions should be uniform throughout Australia. The media operates on a national basis. In this field, as in defamation, inter-state confusion and conflict of laws is undesirable;
- (vi) jurisdiction to enforce the restrictions should be vested in courts. Persons whose privacy is invaded should be given the remedies of injunction, a declaration where appropriate, correction of proved false statements and damages. The possibility should be left open, if a Privacy Commission or like body is established, of empowering that body to approach the court for either damages or penalties in respect of the breach of the suggested restrictions.

It is tentatively proposed that publications prima facie actionable would be those which relate to—

- (a) private behaviour, home life or personal or family relationships, photographs of persons in a private place;
- (b) health, photographs of persons in an injured, ill or distressed condition;
- (c) criminal prosecution, except by contemporaneous report, legal report or legal writing.

The following defences to an action are tentatively suggested—

- (a) consent, express or implied;
- (b) legal authority;
- (c) privilege, as understood in defamation law;
- (d) fair report of parliamentary or court proceedings;
- (e) protection of the interests of the publisher;
- (f) public interest—non-exhaustively defined so as to include matter relating to—
 - public, commercial and professional activities,
 - suitability for public, commercial or professional office,
 - decisions taken or likely to be taken on a public, commercial or professional question,
 - goods and services offered to the public,
 - conviction of offenders, enforcement of the law and public safety,
 - any other matter of legitimate concern (i.e., not merely prurient or morbid interest) to the public or any section of the public.

A draft of possible legislation is set out at the end of the Discussion Paper.

Child abuse and day care

The Australian Law Reform Commission has published Discussion Paper No. 12 under the title “Child Welfare: Child Abuse and Day Care”. Discussion Paper No. 9 which relates to the same reference (dealing with the treatment of children in trouble, young offenders in the criminal system and neglected and uncontrollable children) was noted at (1979) 5 C.L.B. 1204.

The present Discussion Paper deals with the position of children at risk of neglect or abuse by their parents and by their caretakers (day care services) within the wider context of a consideration of the rights and obligations of children, of parents and of other persons who have or assume rights or obligations in respect of children and of the community.

The Commission considers that child abuse, a serious and disturbing problem, is the most extreme example of parents’ failure to provide the care and affection which their children need. It was

therefore necessary to view their proposals within the broader context of a system for dealing with those children at present described as neglected or uncontrollable. With regard to these troubled and troublesome children, two principles should guide society's response to their plight. The first principle was that court action should be avoided wherever possible. Any new legislation should provide a framework which discouraged resort to court action and facilitated the exploration of informal solutions. The second principle was that when it was necessary to take a matter to court, the procedure employed should be quite different from that used for alleged offenders.

The following is a summary of the tentative proposals advanced by the Commission for the purpose of eliciting comment—

Children in need of care

1. The present procedure of charging a child with being neglected or uncontrollable should be abolished and replaced by a procedure by which an application is made to the court to declare the child to be a "child in need of care". A child may be so declared if he—

- (a) is being cared for in circumstances such that his physical health is being seriously impaired or there is a substantial risk that it will be seriously impaired;
- (b) has no appropriate person to care for him because he has been abandoned, because his parents or guardians cannot be located, or because his parents or guardians are dead or incapacitated;
- (c) has suffered serious, non-accidental physical injury or there is a substantial risk that he will suffer such injury;
- (d) has been sexually abused or there is a substantial risk that he will suffer such abuse;
- (e) has suffered serious psychological damage, evidenced by significant emotional or intellectual impairment, or there is a substantial risk that he will suffer such damage;
- (f) is not being adequately controlled by his parents or guardian and his behaviour is seriously harmful to himself; or
- (g) is living in a situation in which there is a substantial and presently irreconcilable difference between himself and his parent or guardian.

2. To avoid the problems existing in current welfare arrangements, an independent official to be known as the Youth Advocate should be appointed. His functions should include—

- (a) the co-ordination of the work of welfare agencies in individual cases;
- (b) the exploration of alternatives to court proceedings, including, where appropriate, mediation and reconciliation;
- (c) the initiation, where necessary, of proceedings to have the child declared to be a child in need of care; and
- (d) duties in relation to criminal proceedings against young offenders.

3. The Youth Advocate should be assisted by a small consultative committee comprised of representatives of the Welfare Branch of the Department of the Capital Territory, the Capital Territory Health Commission and, when appropriate, representatives of the Australian

Federal Police and of voluntary welfare agencies. Its functions should include—

- (a) linking the welfare agencies and the Youth Advocate;
- (b) advising the Youth Advocate as to matters of policy and the handling of individual cases; and
- (c) the monitoring of individual cases.

4. A Youth Services Council should be established. It should be comprised of representatives of the Welfare Branch of the Department of the Capital Territory, the Capital Territory Health Commission, the A.C.T. Schools Authority, the Australian Federal Police, the Family Court Counselling Service and selected voluntary agencies. It should ensure—

- (a) effective co-ordination of existing services;
- (b) the making of recommendations for change in those services; and
- (c) the formulation of policy affecting children and their needs.

Child abuse

5. There should be compulsory notification by medical practitioners and other professionals of suspected cases of child abuse. There should also be provision for voluntary notification by any person of suspected cases of child abuse. The law should make it clear that persons who make a notification in good faith do not incur legal liability. As the facts for the co-ordination of welfare services and the person responsible for initiating care proceedings, the Youth Advocate is a readily identifiable and appropriate recipient of notifications.

6. The police or an authorised officer may remove a child who is in immediate danger of abuse and detain him in a hospital or other place of safety for 48 hours provided that the Youth Advocate is notified as soon as possible and obtains a holding order as soon as possible from a magistrate.

7. In some cases it may not be in the interests of the child that criminal proceedings should be taken against the parent. Procedures (including consultation with the consultative committee) should be introduced to facilitate reconsideration of a decision to take such proceedings. Where, in view of the interests of the child, it is desirable to do so, it should be possible to have such proceedings withdrawn with the leave of the court.

Day care services

8. With the exception of those caring for children in private homes, all those offering day care services for children under seven should have a licence if a charge is made.

9. All those offering day care services—whether a charge is made or not, and whether operating in a private home or not—should have a licence if they care for more than four children under the age of seven.

10. Provisions relating to the licensing of day care services should apply to occasional care, part-time care and full day care.

11. Provision should be made for the granting of interim licences, and for all licences to be reviewed annually.

12. There is no need for legal controls over services provided for children over the age of seven.

13. The existing practice of granting single licences in respect of

designated premises is satisfactory, and there is therefore no need for separate licences for premises and operators.

14. The Court of Petty Sessions, and not the Children's Court, should exercise jurisdiction over proceedings involving alleged breaches of licensing provisions.

15. The Administrative Appeals Tribunal should have jurisdiction to review the granting and revocation of licences.

Human tissue transplants

Report No. 7: "Human Tissue Transplants", has been published by the Australian Law Reform Commission. Submitted with the Report is draft legislation for the Australian Capital Territory which reflects the Commission's recommendations. In the Commission's opinion a uniform approach to transplant legislation is desirable, particularly in view of the doubts which surround the constitutional power of the federal government to enact a national law on the subject.

A table lists relevant cases from Australia, Britain, New Zealand and the U.S.A. discussed in the text, and there is an extensive bibliography. Also included is a table of legislation from some 34 jurisdictions.

The following summarises some of the Commission's recommendations—

- (i) adults should be able to give their tissue on independent medical advice, after signing a written consent, which could be revoked at any time;
- (ii) minors (under 18) after receiving independent medical advice, and with the consent of a parent, should be able to donate regenerative tissue. As regards non-regenerative tissue, donations by minors should generally be prohibited unless all the following conditions are satisfied—
 - (a) the donor and recipient belong to the same immediate family,
 - (b) the recipient is in danger of dying,
 - (c) medical advice is given to the donor regarding the nature and effect of the removal, and of the transplantation,
 - (d) the donor must have sufficient mental capacity fully to appreciate the position, and must agree to the removal,
 - (e) the parents must consent,
 - (f) an ad hoc Committee (comprising a judge, a medical practitioner and a social worker or psychologist) must unanimously decide that the removal is desirable, is in the interests of the donor, and should be permitted;
- (iii) persons lacking legal capacity for reasons other than minority, whether adult or not, should not be subjected to tissue removal;

- (iv) there should be simplified procedures for donation by persons dying in hospital. It should be obligatory to obtain authorisation from close relatives, but by improved procedures;
- (v) coroners should be empowered to give pre-death approval to tissue removal. Such consent may be oral, or by telephone, to be later confirmed. The person who can authorise tissue removal from a deceased should not be able to do so until the coroner has consented, and until the other prescribed inquiries have been conducted and the appropriate responses obtained;
- (vi) the law should forbid payment of any kind to a person for any dead body or part of a dead body, or for human tissue removed in accordance with the recommendations of the Report from any living person or from any dead person, or removed for the purposes of transplantation or other therapy or for medical or scientific purposes;
- (vii) the proposed legislation should provide clear protection to medical practitioners and other persons involved in activities permitted by the recommended legislation. Such persons should not be liable in any proceedings whether civil or criminal, for any act done in pursuance of a consent, agreement or authority given under the legislation when done without negligence and in good faith;
- (viii) provision should be made for removal of tissues obtained during normal autopsies, for public therapy purposes;
- (ix) the proposed legislation should contain a definition of death for all purposes in the following terms—
 - “41. This Part applies in determining for the purposes of this Ordinance or for the purposes of any other Ordinance or continued State law, that a person has died.
 - 42. A person has died when there has occurred—
 - (a) irreversible cessation of all function of the brain of the person;
 - (b) irreversible cessation of circulation of blood in the body of the person.”;
- (x) in the case of “brain death”, where it is desired to remove tissue for transplantation, death should be declared by two registered medical practitioners one of whom should be a neurologist or neurosurgeon. Neither should participate in any transplant involving tissue of the deceased.

The Commission’s Report draws attention to the “considerable future expansion in human tissue transplants”, some of which are expected within the next few years. These include—

- (a) transplantation of a human ovum,
- (b) fertilisation of human ova in test tubes,
- (c) transplantation of genital organs,
- (d) use of fetal tissue.

The Report makes it clear that operations of this kind will shortly be

possible. The scientific breakthrough in immunology is predicted which will increase the success and number of transplant operations. The Report calls attention to the need to give urgent consideration to these matters and others such as genetic engineering, human experimentation, euthanasia and the medical treatment of minors.

Australia— A.C.T.

Child welfare

The Law Reform Commission of Australia has published Discussion Paper No. 9 under the title "Child Welfare: Children in Trouble". The Australian Attorney-General has given the Commission a Reference asking it to enquire into child welfare law and practice in the Australian Capital Territory. The Commission is to consider the rights and obligations of children, of parents and other persons with responsibility for children, and of the community. In particular the Commission is asked to examine:—

- (a) the treatment of children in the criminal justice system,
- (b) the position of children at risk of neglect or abuse,
- (c) the roles of welfare, education and health authorities, police, courts and corrective services in relation to children, and
- (d) the regulation of the employment of children.

The Paper begins by replacing the Reference in its context in relation to law reform activity in this area of the law and states that in view of the wide scope of the Reference and the time limit imposed, the Commission has decided that the initial Report will concentrate on the Australian Capital Territory's system for dealing with young offenders, as well as with neglected and uncontrollable children. The Paper is similarly confined to these three categories. By "the system" is meant the Children's Court, the police, child welfare services, educational and health authorities, correctional agencies and voluntary organisations. The aim of the Report will be to offer a blueprint for procedures for dealing with children in trouble in the Territory.

The Paper gives an historical account of, and describes, the existing system for dealing with children in trouble and concludes that the present system in the Australian Capital Territory is a confused and piecemeal adaptation of procedures employed for adults. Little consideration has been given to the appropriateness of these procedures for the young and at no stage has a coherent and comprehensive set of principles been developed on the basis of which a special tribunal for children can be built.

As a first step towards the integration of child welfare programmes in the Territory and the co-ordination of government-sponsored and community based initiatives to help children in trouble and in need, the Commission has already formed the tentative view that a co-ordinating body should be established. This could be an independent

statutory commission, a statutory council consisting largely of part-time personnel, or a unit in the Welfare Branch of the Department of the Capital Territory. The Commission feels it to be important that there should be a permanent advisory body with representatives of a number of different interest groups associated with child welfare and related areas to act as a stimulus for on-going reform, a monitor of the effectiveness of current laws and facilities and watchdog of children's rights in legislation and practices affecting them.

The following are the key issues identified in the Paper, upon which proposal and comment is invited—

Children in the Criminal Justice System

1. What is the age below which a child should not be criminally liable at all? At what age should a child pass beyond the jurisdiction of a special children's tribunal to the ordinary court system?
2. Should a clear distinction be made between offenders (i.e., children who have breached the criminal law) and non-offenders (i.e., neglected and uncontrollable children)? Should different tribunals, facilities and services be created to deal with each group?
3. If we want a distinctive system for dealing with young offenders why do we want such a system and what characteristics should mark it off from that employed for adult offenders? Should the same penalties apply to a child as to an adult for the same offences?
4. Should greater efforts be made to divert young offenders from the court or tribunal and, if so, how should this be achieved?
 - By Police/Welfare Branch consultation?
 - By the appointment of a reporter or similar official?
 - By the introduction of informal panels?
 - By other means?
5. To what types of services should offenders be diverted?
6. When formal intervention is required what type of tribunal should deal with young offenders?
 - A modified criminal court?
 - A panel?
 - The Family Court?
 - Other?
7. Should very serious offences by a child (e.g., murder) be dealt with in the adult system rather than in a special children's court or tribunal?
8. Should the court or tribunal exercise complete control over the nature and duration of the measures employed for young offenders (e.g., detention for a specified time) or should these measures be flexible, allowing those who administer them to exercise discretion (e.g., indefinite detention to be reviewed in the light of circumstances)?
9. Should new types of measures be available for young offenders?
 - Periodic detention?
 - Community service?
 - Intensive probation?
 - Intermediate treatment?
 - Other?
10. Should an institution for children who commit offences be built in the Australian Capital Territory to replace the present system of sending such children to New South Wales institutions?

Neglected and Uncontrollable Children

11. At what age should the state cease to assert the right to intervene coercively in the life of a neglected or uncontrollable child?
12. In what situations should the state intervene to protect children considered to be neglected or uncontrollable and should these situations be narrowly defined or should the legislative net be cast wide?
13. When formal intervention is required what type of tribunal should deal with neglected and uncontrollable children?
 - A Court of Petty Sessions?
 - The Family Court?
 - A community panel?
 - An expert panel?
 - Other?

The Supporting Services

14. Should greater emphasis be placed on the provision of informal services for children in trouble? If so, what types of services are lacking at present and how can they best be organised and provided?
15. Is fragmentation of services a problem and, if so, how can co-ordination be improved?
16. Should greater use be made of the work of non-governmental agencies?
17. Are there deficiencies in the welfare and psychiatric services available to the Children's Court? If so, what are these deficiencies and how can they be remedied?

Australia— New South Wales

Drug trafficking

The New South Wales Royal Commission on Drug Trafficking has presented its Report to the State Government. The Royal Commission, which was presided over by a Judge of the Supreme Court of New South Wales, was appointed in 1977 to inquire into and report on—

- (a) the cultivation, production, manufacture, distribution, supply, possession and use of illegal drugs;
- (b) the identity of the persons involved in that traffic; and
- (c) whether, in the light of the findings of the Royal Commission, any amendments were desirable in the law relating to drugs.

Apart from recommending the prosecution of certain State police officers and Italian immigrants suspected of having been concerned in drug trafficking, the Royal Commission made 85 other recommendations.

These were—

Cannabis

General

1. The cultivation, possession, supply or use of cannabis should not be legalised.
2. Legislation which would permit the possession of small quantities of cannabis grown for one's own use should not be introduced.

3. The possession or use of cannabis should not be decriminalised.
4. The criminal records of those convicted of possession of marihuana for personal use, or of supplying marihuana by way of gift or without remuneration, should be destroyed at the end of two years, on the application of the person convicted, except in stipulated circumstances.

Access to such records should be restricted to members of law enforcement agencies, and to authorities having lawful access to police records for criminological research.

Psychomotor skills

5. The Government should support a substantial program of research into the effects of cannabis, and drugs generally, on driving performance, with a view to developing suitable practical tests which will enable detection and prosecution of the drug-intoxicated driver.
6. The Government should institute a program whereby the extend of employee drug-taking can be determined and an assessment made of its impact on individual performance, safety and other matters within the industrial setting.
7. The Government and the various authorities concerned, should adopt an increasing role in regulating drug use in industry, and institute a program for the purpose of disseminating, in a practical way, non-drug philosophies to members of the workforce, particularly apprentices and younger workers.
8. Police investigations following discovery of large cannabis crops should thoroughly explore the possibility that the owner, or those arrested on the property, may be no more than minor participants acting on behalf of a major producing or trafficking organisation, and that in such cases careful inquiry into, and analysis of, those and related cases, including those interstate, should be conducted with a view to producing evidence on which to base conspiracy charges against the principals.
9. Institute organised procedures for detecting cannabis plantations and, in particular, for the purpose of more effectively combating large-scale cannabis production—
 - (i) liase with the Department of Agriculture to explore the possibility of satellite monitoring;
 - (ii) enlist the assistance of officers of other departments engaged in field work or property inspection, with such officers being given instruction on what they should look for and the action they should take when they find anything suspicious;
 - (iii) encourage similar media publicity to alert local citizens in growing areas with, perhaps, the ancillary effect of discouraging potential producers;
 - (iv) publicise flights over “high-risk” districts during the growing season.

Narcotics

10. The Government must recognize that the economic conditions of the heroin market and the lack of internal structure at the present time lend themselves to the emergence of an organisationally monopolistic crime syndicate.

11. The Government should institute a program whereby the incidence of new use of narcotic drugs is closely monitored so that remedial policies can be quickly developed and implemented.
12. The Government should encourage and support studies with a view to monitoring the incidence of persons commencing to use heroin.
13. Priority should be given in the enforcement effort towards those drugs with the highest level of direct social cost. At the present time heroin falls within this category.

Other drugs

14. The Police Department and the various health authorities, Federal and State, should work jointly to carry out studies and surveys to monitor trends in the abuse of drugs such as amphetamines, cocaine and hallucinogens.
15. Monitoring work in relation to the incidence of use of heroin, amphetamines, cocaine and hallucinogens should be based on systematic intelligence and assessments of variations in availability, use, quality and price.
16. A small unit should be established within the drug squad of the State Police Department, which can liaise with both the State Health Commission of New South Wales and the State Drug and Alcohol Authority, to produce intelligence summaries at regular intervals for the information of Government, police and interested departments and institutions.
17. Specific steps should be taken against the importation, manufacture or use of phencyclidine and, for the purpose, an "early warning system" coupled with the monitoring of precursors should be instituted on a national basis.

Law enforcement

Policy

18. Endeavours by the United Nations and the United States of America to limit supply in major heroin-producing areas should be supported to the fullest practicable extent.
19. State and Federal Governments should offer some assistance to the Thai Government in the training of personnel and the supply of equipment.
20. There is a need for an increase in Australian law-enforcement personnel in major overseas drug supply centres.
21. There is a need in Bangkok for a small professional unit of Australian law-enforcement officers, with full clerical assistance and adequate transportation.
22. Efforts should be made to evolve an integrated drug enforcement program with other States and the Federal Government.
23. Priority should be given in the enforcement effort to the investigation of high-level and organizational trafficking.
24. The Police Department should divide its manpower resources so that at least 65 per cent of the drug law-enforcement effort is spent in attempting to intercept traffickers above the street level.
25. A specialised drug-enforcement agency should not be established, nor is anything in the nature of a crime commission, designed to combat

all forms of organized crime, recommended until the Police Department is given an opportunity to implement new procedures.

26. There should be an expansion in divisional units of police engaged in drug-related investigations in order to free, so far as is practicable, the drug squad for specialised work.

27. The various law-enforcement authorities must gear themselves to combat an almost inevitable emergence of more highly organized crime than has hitherto been present in the State.

28. There should be published annually a State administrative plan for containing the drug-abuse problem.

29. In fixing a realistic figure for bail in respect of alleged drug traffickers or importers, courts should take into account that—

- (a) some importation organizations have access to vast sums of money, and bail money may represent to such persons a mere operational cost factor,
- (b) reporting conditions on the surrender of passports often have little practical effect in limiting flight,
- (c) an abnormally high proportion of foreign nationals charged with drug-importation offences abscond while on bail.

Intelligence

30. A single, joint, Federal-State intelligence system should be established.

31. There should be an approach on the part of law enforcement to a conspiracy-type investigation and a willingness to postpone action against individuals until evidence is available to involve the whole, or a significant part, of an overall network.

32. The number of police officers trained in surveillance should be increased and the scope of such activities should be broadened.

33. Greater use should be made of undercover agents in the drug enforcement effort in order to apprehend upper-level traffickers.

34. The Government should be prepared to provide more money to the Police Department to aid undercover agents in their efforts against major traffickers.

35. Consideration should be given to the problem of increasing the flow of intelligence from all sources and the need to provide concessions to those who are willing to make information available, including convicted criminals serving prison sentences.

Co-operation

36. State and Federal Governments should commit themselves to close inter-agency co-operation.

37. The joint task force concept should be adopted on a permanent basis by State and Federal Governments.

Treatment and Diversion

Classification

38. Drug offenders coming before courts should be classified in the following manner:

- (1) those charged with trafficking or with serious drug-related criminal offences;
- (2) those charged with simple possession or use of marihuana;

- (3) those charged with illegal use or simple possession of non-narcotic drugs other than marihuana; and
- (4) those charged with possession or use of narcotics but who do not come within Class 1.

In relation to Class 1 offenders, the law should take its course and the offender be dealt with according to the nature and degree of the offence.

Class 2 offenders should be dealt with under the present law but neither diverted nor imprisoned.

Where a Class 3 offender is also a heroin user, he should be treated as if coming within Class 4; otherwise such offenders should be dealt with in the same manner as those coming within Class 2.

Class 4 offenders should be subject to procedures similar to those which the law has developed for dealing with the socially disadvantaged.

Courts should be provided with all relevant information and, in appropriate cases, offenders should be diverted into treatment, but only after being dealt with in relation to the charge.

Treatment

39. There should be a State plan for the organization and co-ordination of drug-treatment services. The plan should be for three years but should be revised and published annually for the ensuing three-year period.

It should direct its attentions to all aspects of the drug problem and contain strategies to be employed in treatment. It should also form the basis for future public expenditure.

The compilation of the plan should be the responsibility of the State Drug and Alcohol Authority, which should co-ordinate the recommendations of the various Government authorities concerned.

40. Drug treatment programs should have practically realisable objectives seeking optimum improvement in drug-oriented behaviour.

41. The financing of therapeutic communities should be continued and funds made available for the expansion of facilities to meet demands by those who are prepared to enter and remain in such programs.

Diversion

42. Diversion schemes, despite their lack of success in the State, should not be abandoned as a method of dealing with drug offenders, and any program proved to be effective should be fully supported by the Government.

43. The Government should make no further decisions as to the structure or funding of diversion schemes until the results of the new pilot scheme, which is soon to be put into operation, are known.

44. No recommendation with regard to the introduction and establishment of any particular diversion scheme could be made as there was insufficient evidence to make any valid determination.

Changes in the Law

Possession

45. Possession of illicit drugs for personal use should remain a criminal offence.

46. No amendment should be made to the Poisons Act 1962 to insert the word "knowingly" as an ingredient of possessory offences under that

Act or to superimpose an additional requirement that the prosecution establish mens rea in respect of such offences.

47. Section 4(1) of the Poisons Act should be amended by inserting a new definition of “possession” which accords with the judgments of the New South Wales Court of Criminal Appeal in *R. v. McGrath*, *R. v. Bush*, *R. v. Rawcliffe*, *R. v. Router* and *R. v. Kennedy*.

48. No amendment should be made of the Poisons Act to insert a statutory presumption as to possession by specified persons in situation where illicit drugs are found concealed in places to which no one person has exclusive access.

Paraphernalia

49. No amendment should be made to s. 21(1)(f) of the Poisons Act to remove the requirement to establish that a person intended to use illegally specified drug paraphernalia in his possession.

50. No amendment should be made to the Poisons Act to prohibit or regulate the sale or possession of hypodermic syringes and needles.

51. The Poisons Act should be amended to prohibit inciting or soliciting, whether by advertising or otherwise, persons to obtain or use instruments designed to facilitate the use of illegal drugs.

Analogues and precursors

52. The definition of “substance” in s. 4(1) of the Poisons Act should be amended to include—

(a) any preparation or admixture of all salts and derivatives of any substance; and

(b) anything represented or held out by or on behalf of the person selling or supplying it to be such substance.

53. No amendment should be made to the definition of “substance” in s. 4(1) of the Poisons Act to include “analogues” thereof, or to include “other closely related substances with a similar chemical composition producing broadly equivalent pharmacological effects”, or to expand the definition by any similar means.

54. No amendment should be made to the definition of “substance” in s. 4(1) of the Poisons Act to include “immediate precursors” thereof.

55. Prominent precursors of commonly used illicit drugs should be included in the Poisons List, where not already included, and it should be an offence under the Poisons Act to possess any such precursors “with the intention of manufacturing, contrary to this Act, any prescribed restricted substance, drug of addiction or prohibited drug”.

56. Regulations should not be introduced requiring drug companies and proprietors of businesses selling chemicals to report to the police full details of all suspicious purchases of specified chemicals which are known to be immediate precursors of various named illicit drugs.

Power to search

57. Search powers equivalent to those which officers of the Federal Narcotics Bureau now exercise by means of general warrants or writs of assistance under ss. 198, 199 and 200 of the Federal Customs Act 1901 should not be conferred on the New South Wales police officers.

58. The Poisons Act should be amended, as the Police Department proposes, to empower police officers investigating suspected drug trafficking to enter premises without warrant in exigent circumstances.

However, with a view to preventing abuse, the following statutory provisos should apply—

- (a) Warrantless searches should not be undertaken by virtue of this amendment, where it is reasonably practicable to obtain a warrant before entry and unless the police officer effecting entry into the premises suspects or believes on reasonable grounds that:
 - (i) a traffickable quantity (as defined in the Poisons Act) of illicit drugs is on the premises; and
 - (ii) there is a substantial risk of imminent destruction or removal of those drugs before entry by warrant can be effected.
- (b) In any case where such a warrantless search is carried out, the police officer conducting the search should, regardless of whether or not a traffickable quantity of illicit drugs is found, within 24 hours of entry into the premises, make a statutory declaration setting forth details of—
 - (i) his reasons for not obtaining a warrant;
 - (ii) the basis for his suspicion or belief that a traffickable quantity of illicit drugs was on the premises; and
 - (iii) the basis for his suspicion or belief that there was a substantial risk of imminent destruction or removal of those drugs before entry with a warrant could be effected.
- (c) Within seven days of such warrantless search being conducted, and regardless of whether or not an occupant of the premises makes a complaint, statutory declarations by the police officer conducting the search and any other police officers involved in the entry of the premises, together with a report by a superior officer of the Police Department should, in all cases, be forwarded to the State's Ombudsman for examination and, if required by him, to the police internal affairs branch for investigation and any necessary disciplinary or other action.

59. To modernise the application procedures for search warrants, and to enable police investigating suspected drug trafficking or other offences to move swiftly in exigent situations, and to alleviate the need for warrantless searches, legislation should be enacted, as the Police Department proposes, to permit search warrants to be obtained by telephone or two-way radio.

However, to minimise the risk of abuse, this procedure should not be used unless a genuine emergency exists, it should not be used in complex cases, and the oral application should be recorded.

60. Legislation should not be introduced to permit warrantless entry into premises for the purposes of "impounding" them until a search warrant can be obtained.

61. The amendment of s. 43(2) of the Poisons Act, proposed by the Police Department, to remove the requirement that the complaint made for the purpose of obtaining a search warrant show on its face the grounds upon which the reasonable suspicion or belief exists, is not recommended.

62. Section 43(2) of the Poisons Act should be amended, as the Police Department proposes, to remove the requirement that a warrant shall, on its face, name the police officer who is to execute it.

63. Section 43(2) of the Poisons Act should be amended, as the Police Department proposes, to make it clear that execution of a search warrant under that Act can take place either by day or night.

64. Either the Poisons Act or the Crimes Act 1900 should be amended, as the Police Department proposes, to make it clear that any police officer of or above the rank of Sergeant or in charge of a police station or a police vessel has power to stop, search and detain any vehicle or vessel in which he reasonably suspects that there is any drug of addition, prohibited drug or prohibited plant.

65. Either the Poisons Act or the Crimes Act should be amended, as the Police Department proposes, to make it clear that any police officer has power to stop, search, and detain any person whom he reasonably suspects of having or conveying any drug of addition, prohibited drug or prohibited plant.

Electronic interception

66. The Police Department should, without delay, commence to utilise fully its powers under the Listening Devices Act, 1969 (NSW) to intercept non-telephonic communications, especially in the area of illicit drug trafficking.

67. Federal legislation should be amended, as the Police Department proposes, to permit State police, in investigating drug trafficking, to intercept telephone communications and other telecommunications, upon approval being given by a Judge of the Supreme Court of New South Wales or Judges of the Federal Court of Australia, or the State Attorney-General.

Compulsory interrogation

68. Amendment of the law, as the Police Department proposes, to permit compulsory interrogation of suspected drug traffickers, in so far as this involves the privilege against self-incrimination being abolished or curtailed, is not recommended, but further consideration by the Government of this question is necessary.

69. Enactment, as the Police Department proposes, of a Special Crime Investigations Act, which would confer power of compulsory interrogation in relation to a vast range of criminal activities, including those of suspected major drug traffickers, is not recommended.

70. Enactment, as the Police Department proposes, of analogous provisions to Part VI A of the Companies Act 1961, for the purpose of compulsory interrogation of suspected major drug traffickers, is not recommended.

Bounty schemes and rewards

71. Drug bounty schemes, whether statutory or private, which promise rewards for information leading to conviction of drug traffickers, should not be introduced, promoted or encouraged.

72. No amendment should be made to the Poisons Act to establish a system of rewards for the supply of information leading to the conviction of drug traffickers.

Informers

73. Amendment of the Poisons Act, as the Police Department proposes, to render immune from examination by courts or the defence reports or

documents produced within the Police Department or received by it in any official capacity relative to any prosecution under that Act, is not recommended.

74. Amendment to the Poisons Act, as the Police Department proposes, to prohibit the disclosure of the names of informers in any circumstances in the course of prosecutions under that Act, is not recommended.

Compulsory disclosure of source

75. The Poisons Act, as the Police Department proposes, should be amended to make it an offence for a person found in illegal possession of drugs to refuse or fail to disclose the name and address, if known, of the person from whom he obtained the drugs, the place from which he obtained them, and such other details as would assist in the identification and location of that person.

Bail

76. No amendment should be made to the Bail Act 1979, to prohibit the granting of bail, or to create a presumption against bail, for persons charged with drug-trafficking offences.

Sentencing

77. No amendment should be made to the Poisons Act to increase the terms of imprisonment prescribed under that Act.

78. Penalties for simple possession or use of narcotic drugs should not be reduced.

79. Amendment of the Poisons Act to restructure penalties by creating greater specificity of punishment, whether in the form of mandatory minimum sentences or a rigid and graded tariff of penalties, is not recommended.

Forfeiture

80. Amendment of the Poisons Act, as the Police Department proposes, to provide for forfeiture of vehicles (including planes, boats and motor vehicles) used to assist in the commission of offences under that Act, is not recommended.

Fines

81. The maximum fine in respect of indictable offences under the Poisons Act should be increased from \$A60,000 to \$A200,000.

82. The introduction of legislation authorizing "means inquiries" to investigate the financial position and dealings of convicted major drug traffickers, with a view to making imposition and recovery of fines more effective, is not recommended.

Goods in Custody

83. Extension of the "goods in custody" provision in s. 527C of the Crimes Act 1900 to cover situations where the proceeds of drug trafficking have been placed in an account such as a bank, building society, credit union or solicitor's trust account, is not recommended.

84. The Poisons Act should be amended to empower a court, upon conviction of a person charged with an offence under that Act, in

addition to penalties of imprisonment and fine otherwise provided, to order execution against—

- (a) property held by or on behalf of that person which has been obtained or paid for whether wholly or in part as the result of the commission of that offence;
- (b) any account (e.g. bank, building society, credit union, solicitor's trust or other similar account) kept in that person's name or on his behalf where an amount has been credited to that account, as a result of the commission of that offence.

Confidentiality

85. Legislation should be introduced which, subject to specified exceptions—

- (a) makes communications between a drug abuser and drug treatment facility staff confidential, and prohibits disclosure thereof; and
- (b) protects from disclosure the records of that facility in respect of communications with, and testing, examination, diagnosis and treatment of drug abusers.

**Australia—
South
Australia**

“The Substantive Criminal Law”

The Criminal Law and Penal Methods Reform Committee of South Australia has published its Fourth Report on “The Substantive Criminal Law” [briefly noted at (1978) 4 C.L.B. 614].

The Report, which runs to 460 pages, includes tables of cases and statutes, and a bibliography. Earlier Reports of the Committee appeared in 1973 (First Report—Penal Methods), 1974 (Second Report—Criminal Investigation and Procedures), 1975 (Third Report—Court Procedure and Evidence), and 1976 (Special Report on Rape and Other Sexual Offences).

In introducing this Report, the Committee points out that amendments to the substantive law recommended in earlier Reports have not been reconsidered, although where practicable references are made to those earlier recommendations. For ease of reference, the Special Report on Rape and Other Sexual Offences has been reproduced as Chapter 4 of the Report in the form in which it was originally presented.

Below is a summary of the Committee's principal recommendations.

- (xviii) the following should be the test of insanity as an answer to a criminal charge in substitution for the McNaghten Rules—

A person is not criminally responsible for an act or omission if at the time of doing the act or making the omission he is in such a state of mental disease or natural mental infirmity as to deprive him of capacity to understand what he is doing, or of capacity to control his actions, or of capacity to know that he ought not to do the act or make the omission;

- (xix) no special provision should be made for insane delusions, nor should the law relating to automatism be changed;

- (xx) a defence of diminished responsibility in charges of murder should not be introduced;
- (xxi) the term “intoxication” should not be limited to intoxication by the ingestion of alcohol but include the disordering of the faculties by any drug or poison;
- (xxii) intoxication should be only a factor to be taken into account with the rest of the evidence in determining the defendant’s actual state of mind at the relevant time. The question whether the defendant became drunk voluntarily should be irrelevant as a matter of law unless either the defendant is charged with an offence of which intoxication is by definition an element or there is evidence that he deliberately ingested intoxicants to nerve himself for the commission of the offence charged. In the latter case his state of mind immediately before he set about intoxicating himself should be the relevant one for the purpose of criminal responsibility;
- (xxiii) the law of causation with respect to offences of which the causing of death is by definition an element should be that the defendant caused the death charged if his acts or omissions substantially contributed to the death having regard to the time at which and the manner in which it occurred: the year-and-a-day rule should be abolished;
- (xxiv) the law relating to involuntary manslaughter should be abolished;
- (xxv) the rule of law under which suicide or an attempted suicide is a crime should be abrogated;
- (xxvi) legislation similar to that contained in s. 6B of the Crimes Act 1958 (Victoria) in relation to suicide pacts and inciting to commit suicide should be enacted;
- (xxvii) an offence of mercy killing should not be introduced;
- (xxviii) an inquiry as to the circumstances under which life support systems may lawfully be withdrawn should be conducted;
- (xxix) there should be no statutory definition of death for the purposes of the criminal law.
- (xii) the age of consent for the purposes of tattooing, or medical or surgical treatment should be 16 years;
- (xiii) so far as the criminal law is concerned, no person should be required to undergo medical or surgical treatment if it is against his religious beliefs to do so, and the appropriate age of personal decision should be 16 years;
- (xiv) an offence directed at penalising conduct which causes death or serious harm to persons by frightening them to such an extent that they bring these consequences upon themselves should be enacted;
- (xv) in the law relating to abortion any belief on the part of the

defendant should be required only to be genuine but not necessarily objectively reasonable, in accordance with general recommendations as to belief on the part of the defendant in the criminal law.

- (i) there should be no statutory definition of rape. In a charge of rape the Crown should continue to bear the onus of proving beyond reasonable doubt that the accused had unlawful sexual intercourse with a person without her consent, knowing that she is not consenting, or being recklessly indifferent as to whether she is consenting or not;
- (ii) the statutory presumption that a boy under 14 years of age is incapable of committing rape should be abolished;
- (iii) a husband should be indictable for rape upon his wife whenever the act alleged to constitute the rape was committed while the husband and wife were living apart and not under the same roof, notwithstanding that it was committed during the marriage;
- (iv) there should be created a specific crime relating to *penetratio per os* where such act is performed upon a person who submits under force or by fear induced by threat, or who is asleep or rendered incapable of resistance through intoxication or otherwise;
- (v) except as otherwise expressly provided the age at which a person shall, for the purposes of a criminal prosecution, be capable of consenting to sexual intercourse or to an act constituting an indecent assault, should be 16 years;
- (vi) a person aged 14 years or over should be capable, for the purposes of a criminal prosecution, of consenting to sexual intercourse (or to an act constituting indecent assault) with a person who is not more than 5 years older than him or her;
- (vii) a person under the age of 18 years should be incapable, for the purposes of a criminal prosecution, of consenting to sexual intercourse (or to an act constituting indecent assault) with his or her guardian, teacher, schoolmaster or schoolmistress, unless such guardian, teacher, schoolmaster or schoolmistress is not more than 5 years older than the ward or pupil and the ward or pupil is aged 14 years or over;
- (viii) the existing law should be repealed and be replaced by a section making it an offence to have sexual intercourse with a person known to the offender to suffer from a mental defect or disease which renders him or her incapable of appraising the nature of his or her conduct and thus incapable of giving a true consent to sexual intercourse;
- (ix) a person under the age of 18 years should be incapable, for the purposes of criminal prosecution, of consenting to sexual intercourse or an act constituting an indecent assault with his or her parent or brother or sister, but a person who has sexual

intercourse with, or commits an act constituting an indecent assault upon, his brother or sister of or above the age of 14 years should not be liable to prosecution if such person is not more than 5 years older than the brother or sister;

- (x) specialist police officers who deal with alleged rape victims should undergo a course in practical psychology before appointment;
- (xi) there should be established a panel of doctors (including women) one of whom should be selected to examine the alleged victim of a rape. The alleged victim should be examined by a woman doctor if she so elects;

Non-medical use of drugs

The South Australian Royal Commission on Non-Medical Drug Use of Drugs in South Australia has presented its Report to the South Australian Government [also see (1979) 5 C.L.B. 563].

The Royal Commission has recommended that people charged with possessing illegal drugs should appear initially before a three-member drug panel at a private, informal, hearing. It recommended that new drug assessment and aid panels be modelled on the aid panels before which juvenile offenders appear in South Australia.

The drug panels would determine whether criminal prosecution should proceed.

“If the panel decides that a prosecution should not proceed, it should consider what treatment or other action, if any, is required to assist the offender to overcome the problems associated with his use of drugs”, the Report of the Royal Commission says.

The panels would have no power to force compliance with their decisions, but could require the offender to appear and give undertakings for up to six months. They would not try to establish guilt or innocence. Proceedings would be informal, with power to hear submissions from a person who has been treating or counselling the offender. Legal representation is not recommended.

In deciding what action should be taken, the panel would have to take into account the charged person’s personal circumstances, his suitability and willingness to undergo treatment or other programme, and the need to protect the community.

“In some circumstances prosecution will be clearly warranted,” the Report says, “This might be the case where the offender is charged with a number of offences of which possession is only one.” A first offender who is an experimental user of drugs and clearly not in need of any formal treatment might be thought to warrant a caution or advice rather than the stigma of a conviction.

“We emphasise that not all offenders require treatment and part of the panel’s function is to identify the offenders who might benefit from treatment,” the Report says.

The Royal Commission also recommends the repeal of legislation authorising the compulsory committal of drug-dependant people to institutions.

Police searches: Special rules for investigation and arrest in drug-related matters should be changed in some cases, the Royal Commission stated.

Warrants for police to enter and search premises over drugs should be valid for a specified period, of up to 14 days, instead of only during a nominated day.

But warrants to enter and search premises, now in practice issued by police officers, should be issued only by a magistrate or a judge.

However, the Commission recommends also that in an emergency police should have the power to enter and search premises without a warrant. Such situations would include cases where entry is required to prevent destruction of evidence.

Although at common law a person is not required to submit to a search involving bodily cavities, the Commission said that "because of the techniques used to transport drugs illegally we are persuaded that there may be occasions when it is necessary to conduct a medical examination to ascertain if a suspect is carrying drugs."

Because severe infringement of personal dignity was involved in such searches, they should be carried out only after arrest and with the written consent of the person or after a police officer has satisfied a magistrate that there was reasonable cause for the examination.

Consolidation of existing controls over the availability and use of mood-altering drugs under the Controlled Substances Act (S.A.) is recommended.

In criminal offences, magistrates hearing charges of supplying illegal drugs should be able to impose a maximum fine of \$A2,000, two years' imprisonment or both, and be able to refer the case to a higher court if a more severe penalty is warranted.

Drug education: A complete review of school and community drug education programs should be undertaken, the Royal Commission says.

Education in schools is often seen as the answer to curtailing the spread of non-medical drug use. But after evaluating drug-education programmes in Australia and overseas the Commission concludes that the normal education is much less effective in changing behaviour related to drug-taking than most people realise. "Consequently, the notion that drug-education programme can be used as a short-term measure to reduce markedly the number of young people engaging in illegal or harmful drug use is an over-simplification," it says.

"Indeed, there is evidence that certain kinds of drug education, particularly when outsiders are brought into schools for 'one-night stands', can actually encourage young people to experiment with drugs."

Drug education in schools should take place within a broad health-education program. This would place the problem in wider perspective.

Treatment: The Commission says that treatment for drugs use is a far more complex issue than is often thought.

“The special problems include the difficulty of defining what is to be treated, since the circumstances of persons requiring treatment for drug mis-use are very different and addiction itself is not an easily diagnosed condition”.

“It is also difficult to formulate goals for treatment programs and to measure where programs are successful”.

Abstinence from drug use is often not possible for addicts. Even more modest objectives, such as improved social participation, may prove elusive.

In assessing the role of opiate-maintenance programs, the Commission says that there are dangers in prescribing methadone too freely as a substitute for heroin.

Drug sales: The Royal Commission recommends that compound analgesics, now sold over the counter, be available only on a doctor’s prescription.

The Royal Commission said: “The evidence strongly suggests that compound analgesics containing caffeine are widely mis-used, the habituating effects of caffeine being a likely factor in this”.

“There are adverse side effects on the kidney resulting from the use of compound analgesics. The single analgesics have their side effects too, but these are not as dangerous as with the compound analgesics”.

It says most people can be expected to obtain as much pain relief by using a single as by using a compound analgesic.

The Commission says it has changed its tentative opinion on the need to give the retail pharmacist greater control over the distribution of single analgesic preparations.

It concludes now that the risks of present public use are not great enough to justify restricting their distribution to retail pharmacies.

Australia— Tasmania

Decriminalisation of drunkenness and vagrancy

The Law Reform Commission of Tasmania (Report No. 3 of 1977) has made the following recommendations—

- (i) the offences of being drunk and disorderly and of being drunk while in charge of any vehicle or animal, or when in possession of any firearm and ammunition or of any other dangerous weapon, should remain punishable offences as at present;
- (ii) there should be no punishable offence of being drunk and incapable of taking care of oneself. Instead, persons who are drunk and incapable should be dealt with as set out in recommendation (viii) below;

- (iii) section 5 of the Police Offences Act should be amended to provide for two categories of persons—
 - (a) Those who are destitute, and
 - (b) Those who are living upon money or property dishonestly obtained;
- (iv) being destitute should not be a punishable offence. Instead, such persons should be dealt with as set out in recommendation (viii) below;
- (v) there should be a new offence of living upon money or property dishonestly obtained, based upon the reasonable belief of a police officer. The onus of showing that his money or property was obtained honestly should be upon the offender, and the court should take sworn evidence as a matter of course;
- (vi) special 'institutions' should be established to provide temporary accommodation, treatment, diagnostic and therapeutic services, and other facilities for persons who are drunk and incapable of taking care of themselves or who are destitute;
- (vii) unless and until such institutions are established at appropriate centres, 'places of safety' should be designated to which police officers can take drunk and destitute persons for protection. At such places of safety persons will receive, at the least, accommodation for the night. In addition, where such places are located in urban centres, they should be able to obtain treatment and counselling;
- (viii) the machinery provisions for dealing with persons who are drunk and incapable or who are destitute should be as follows—
 - (a) a police officer shall have power to arrest such a person and to convey him to 'an institution' or 'a place of safety' provided that the police officer reasonably believes that this course is necessary for the protection of such person,
 - (b) such person may be lawfully detained at such institution or place of safety for a period not exceeding twenty-four hours,
 - (c) such person shall be released after a maximum period of twenty-four hours' detention unless a police officer has reasonable grounds for believing *either* that such person is then incapable of taking care of himself *or* that he is alcohol or drug dependent *or* he has no suitable accommodation to which to proceed. In either of such cases, the police officer shall arrange for such person to be brought before the court without delay so that he can be heard and suitable arrangements made for any treatment and care,
 - (d) no complaint or other form of documentation shall be necessary in order to bring such person before the court,
 - (e) any person detained under the above provisions may, if he

so desires, apply to the court in a summary way for a determination of his case, notwithstanding that he has been released after a maximum period of twenty-four hours' detention,

- (f) where such person appears before the court, under either (c) or (e) above, it shall, wherever practicable, be constituted by a magistrate sitting alone. No publicity shall be given to the proceedings before the court except at the express request of such person or any person appearing on his behalf;
- (ix) leaving an institution or place of safety whilst under lawful detention should be made an offence punishable in the ordinary way.

Australia— Victoria

Prostitution—the alternatives

The Victorian Minister for Social Welfare has issued a paper advocating compulsory health checks for prostitutes, a brothel tax and special traffic controls in "red light" areas. The paper also canvasses the possibility of sanctioning soliciting in bars and restaurants, using ex-prostitutes in welfare work and asking customers to produce medical certificates.

The paper, "Prostitution—the Alternatives", discusses the options of prohibiting, suppressing, decriminalising and legalising prostitution, and coincides with the Victorian Government's plans to introduce higher penalties and tougher planning controls in legislation.

The discussion paper admits that existing legislation "does not come to grips" with many problems and "cannot be considered to provide an effective control of...prostitution and neither is it regarded as generally enforceable". It says that restrictive definitions made it difficult to prove offences and were often irrelevant. Further, it was difficult to prove prostitution was taking place and to trace "behind-the-scenes owners", and penalties did not deter illegal massage parlours.

The paper also cites inequities in existing laws, such as sexual discrimination against women and the fact that the prostitutes' customers are not prosecuted. There was also the question of the individual having the right to determine what to do with his/her own body. "Promiscuity in itself is not an offence" it says. "Should promiscuity with payment then be considered an offence?" It could also be said that prostitutes had a right to keep someone on their earnings if they wanted to.

The paper stated that Police estimated that there are 156 massage parlours, 122 escort services involving 300 prostitutes and 50 street-walkers. It says there is no reliable information on the incidence of

“pimps or hoons” and payment of money for protection. It lists prostitution problems as public nuisances (such as offence advertising, traffic problems and gutter crawling), protection of prostitutes, and general public concern (such as organised crime, drugs and police corruption).

It says there are four major options open; prohibition, aimed at eliminating prostitution from Victoria; suppression, aimed at discouragement but recognising prostitution will not be wiped out; decriminalisation, a laissez-faire policy using only normal business controls; and decriminalisation with special controls.

The paper suggests various actions the Government could take, and the problems likely to be encountered. For example, prohibition would drive prostitution further underground and suppression would maintain prostitution “as part of the criminal subculture”.

The longest discussion is on regulation or legalisation under which prostitution would be decriminalised in part or whole, with certain controls.

Organ transplants

The Victorian Government has been urged to amend the State’s legislation on organ transplants from both living and dead donors [see also (1980) 6 C.L.B. 320].

In a Report prepared by a Committee headed by a former State Coroner, formed to examine recommendations by the Australian Law Reform Commission on human tissue transplants, the committee has called on the Government to adopt the Commission’s suggested definition of death—viz: that a person was dead after irreversible cessation of all brain functions or irreversible cessation of blood circulation.

The Report says that the Government should integrate, in one piece of legislation, laws on human tissue transplants, post mortem examinations and the donation of vital organs, and that relatives should not be able to thwart a person’s wish to donate his organs or tissue after he has died. Also, donation of children’s non-regenerative tissue and organs, such as kidneys and lungs, should not be allowed.

The Report points out that four existing Acts in Victoria do not deal with problems created by recent medical developments and changing community attitudes, and that there is a gap in the legislation on the position of children as donors, the use of bodies for research, and the determination of death.

The State Minister for Health said the proposed legislation gave guidelines on consent for organ transplants, from both live and dead donors, and also sets out procedures for obtaining consent for post mortem examinations which take into consideration the wishes of the deceased person before death and the wishes of such a person’s next-of-kin.

The Committee recommends the repeal of Victoria’s Medical Act 1958 and the Sale of Human Blood Act 1962, and major amendments to the Medical Practitioners Act 1970.

The Committee's major recommendation was that, under the proposed legislation, a person's decision to donate an organ or organs should be respected after he or she died. Now, if a close relative objected to the organs being removed, the wishes of the deceased could be ignored and no organ transplant would take place.

The Committee also suggested a number of amendments to the Law Reform Commission's findings, including that the donation of non-regenerative tissue by children should be forbidden.

Australia – Western Australia

Exemption from jury service

The Law Reform Commission of Western Australia has published a Working Paper on "Exemption from Jury Service" (Project No. 71); which discusses the issues involved, sets out the Commission's provisional views, and calls for comments.

The Working Paper explains that the State law relating to the qualifications of jurors, their mode of selection, and the right to obtain exemption from jury service is contained principally in the Juries Act 1957 – 76. The existing legislation replaced the Jury Act 1898 and introduced a number of important reforms in the law making the electoral roll the basis for general liability for jury service instead of a list compiled by the police from among those with certain property qualifications. It also abolished special juries, and gave women the right to serve as jurors, while giving a woman the special privilege of cancelling her liability to serve by sending notice the Sheriff.

The Working Paper reviews the law in other jurisdictions, and pays special attention to the law in England, New South Wales [see (1978) 4 C.L.B. 234] and Victoria. It notes that in these jurisdictions the notion of exemption from jury service has been replaced by those of ineligibility and right to be excused. Persons whose occupation involves them in the administration of law and justice are declared to be ineligible to serve, examples being members of the judiciary and police and prison officers. Those whose occupation is such that interruption of it for jury service could unduly inconvenience or harm the public are given the right to be excused, examples being members of emergency services and doctors.

The Commission considers it to be axiomatic that the obligation to serve as a juror should be spread as widely and fairly as practicable throughout the community. A person should not be freed from the responsibility of jury service, or denied the right to serve, except for good reason. No one should be freed from jury service simply for the purpose of avoiding what might be seen as a tiresome duty, or to avoid some minor inconvenience to the person concerned or the public. In the Commission's view, a person should be denied the right to serve on a jury, or freed from the responsibility of jury service, only if he or she –

- (a) is not a fit person to serve as a juror,
- (b) is involved in the administration of law and justice to such an extent as to make it inappropriate that he or she should serve as a juror,
- (c) performs duties of such a nature that interruption to them for jury service would cause serious inconvenience or undue personal hardship to any other person,
- (d) would suffer undue personal hardship if required to serve as a juror.

The Commission suggests that the law as to jury service should neither discriminate against women nor favour them. Accordingly, the present right of a woman to cancel her liability to serve should be abolished. In its place should be a provision entitling pregnant women and persons who are caring for children or for aged or sick persons to excusal as of right.

The Commission also considers that, since a coroner's jury could return a verdict upon which the coroner could found an order that a person be committed for trial, the classes of person who should be ineligible for jury service in respect of criminal and civil trials should also be ineligible in respect of coroners' juries. There also seemed to be no reason why the classes of person who should have the right of excusal in respect of criminal and civil trials should not also be entitled to be excused from service on a coroner's jury.

The Working Paper lists those whom it suggests should be ineligible for jury service, and those who should be entitled to be excused from such service, as follows –

Persons ineligible for jury service

Parliament

Members and officers of the Legislative Assembly
 Members and officers of the Legislative Council
 The Parliamentary Commissioner for Administrative Investigations

Law

Judges, Stipendiary Magistrates, Judges' Associates and ushers
 Justices of the Peace
 Sheriff's officers and court bailiffs
 Legal practitioners, enrolled in the Roll of Practitioners pursuant to the
 Legal Practitioners Act 1893

Government

The Commissioner of Police and all persons under his direction and control
 The Director of the Department of Corrections and all officers under his
 direction and control
 Members of the Parole Board
 Officers under the jurisdiction of the Attorney General (excluding officers of
 the Land Titles Office and Public Trust Office)
 Officers of the Department for Community Welfare
 Officers and temporary employees employed in the Road Traffic Authority

Incapacitated Persons

Persons incapacitated by reason of infirmity of mind or body from discharging the duties of jurors

Commonwealth Officers

Persons exempt under the Commonwealth Jury Exemption Act 1965

Persons with the right to be excused from jury service

Emergency Services

Persons actually engaged on Civil Emergency Services
Officers and members of permanent fire brigades

Health

Medical practitioners, dentists, veterinarians, psychologists, nurses and chiropractors registered as such according to law, if actually practising
Pharmaceutical chemists registered as such according to law, if actually engaged in business
Staff of the Derby Leprosarium
Staff of mental hospitals
General staff of hospitals and homes for aged persons

Commerce and Industry

Harbour and marine pilots
Masters, officers and members of crews of vessels actually trading
Inspectors of Mines
Mining managers and engine-drivers on mines in which not less than ten men are engaged in mining operations
Pilots, navigators and radio operators of commercial aircraft

Family

Pregnant women
Persons who have the full-time care of children under the age of 14 years or of persons who are aged or in ill-health

Religion

Ministers of religion

Barbados

Report of the National Commission on the Status of women in Barbados

The National Commission on the Status of Women in Barbados, appointed in 1976 with wide ranging term of reference, has now presented its most comprehensive Report. Its 1,461-page Report examines the historical background, traditional attitudes; women and the law; education; women and employment; health; the family; women and the church; and politics; and the media; the contribution of women, and abortion.

Included among its 212 recommendations, and of particular interest to lawyers, are—

- (liii) that any proposal to change the existing abortion law in a more permissive direction should contain provisions not only for providing an abortion service but for mounting an anti-abortion education programme;
- (liv) that before attempting to change the abortion law efforts should be made to ensure that the contemplated change represents the collective national desire and that the nation is made fully aware of the possible consequences of its choice;
- (lv) that the service should permit abortion on the sole request of women up to the twelfth week of pregnancy;
- (lvi) that beyond twelve weeks, abortion should be permissible under specified conditions;
- (lvii) that in the case of those under 18 years, those over 40 years, and those with four or more children, indications for termination of pregnancies beyond twelve weeks should be liberally interpreted;
- (lviii) that where medical termination of pregnancy beyond twelve weeks involved high medical risk, possibly death, to the mother, the consent of at least one parent of minors and the spouse/partner of older women should be obtained;
- (lix) that abortions only be performed by a registered medical practitioner;
- (lx) that a counselling mechanism should be included in the service for women who wish to be aborted beyond the twelfth week of pregnancy (This may be achieved by referral from the doctor to a special social service agency followed by a delay of not less than three and not more than seven days before the abortion is performed. This is to give the woman a chance to weigh the advantages and disadvantages of having an abortion before making a final decision);
- (lxi) that consideration should be given to the devising of a system to ensure that abortions are not performed on pregnant women who had an induced abortion within the previous six months;
- (lxii) that provision for adequate and up-to-date record keeping should be made;
- (lxiii) that the service should be available in the following places—
 - (a) separate in and out-patient facilities at the Government Hospital,
 - (b) Government clinics operating out-patient facilities with in-patient cases referred to the facilities at (a),
 - (c) the Family Planning Association – on an out-patient basis with in-patient cases referred to at (a), and
 - (d) private sector;

(IxiX) that medical practitioners and auxiliaries who object to abortions on the grounds of conscience, should not be required to work in any of the publicly provided facilities.

One of the Commission has entered a minority report (principally in disagreement with the recommendation that grounds for abortion be widened), and the Commission's Chairperson, Ms. Norma Monica Forde, has presented a separate statement which urges more wide-ranging reform of family and other laws. In particular she would see the abolition of all the old common law actions which were designed to protect the proprietary rights of the man and only in small measure and indirectly benefited the woman, such as breach of promise of marriage, jactitation of marriage, and loss of consortium.

The three volumes of the Report may be obtained from the Barbados Government Printing Office.

Canada

Committee on the operation of the abortion law

In 1969 the Criminal Code was amended to provide that an abortion could lawfully be performed by a qualified medical practitioner in an accredited or approved hospital if the therapeutic abortion committee of the hospital has issued a certificate stating that in its opinion the continuation of the pregnancy would or would be likely to endanger the woman's life or health. In the period that has elapsed since this change in the law concern was expressed over the way the law was working. In view of the limited amount of factual information available the Government of Canada appointed a sociologist, a physician and a lawyer to conduct a fact-finding study "to determine whether the procedure provided in the Criminal Code for obtaining therapeutic abortions is operating equitably across Canada". This group, the Committee on the Operation of the Abortion Law, was under the chairmanship of Professor Robin F. Badgley of the University of Toronto. The Committee was not asked to consider the merits of the abortion law itself or to make recommendations. The terms of Reference, which were intended to assist the Committee in its task, stated that it was to "make findings on the operation of this law rather than recommendations on the underlying policy".

The Committee visited many hospitals, surveyed their operations and staff, conducted a survey of doctors to ascertain their views and the extent of their experience with abortion and surveyed as well nearly 5000 women who had obtained abortions. A Gallup poll was commissioned to establish the knowledge and experience of adults and teenagers with induced abortion, and statistics were obtained from abortion centres in the United States to ascertain the extent to which Canadian women were travelling abroad to obtain terminations.

The Committee made a number of findings on matters within and related to its terms of reference. Some of the major findings were –

- (i) no consensus exists for major changes in the law – most Canadians were neither in favour of removing abortion from the Criminal Code nor of refusing therapeutic abortions under any circumstances. Their complaint was with the way the law was working;
- (ii) the law is not operating equitably – the procedure provided in the abortion law for obtaining therapeutic abortions is not operating equitably across Canada. There are sharp disparities in the distribution and accessibility of therapeutic abortion services and unreasonable pressure on some physicians and hospitals. The burden of the inequitable operation of the abortion law tends to fall on women who are less well educated, who have lower incomes and who live in smaller centres or rural areas with no direct access to abortion services;
- (iii) the abortion law itself is not inequitable – the 1969 amendment to the abortion law resulted in a sharp reduction in illegal abortions. In addition, there was a substantial reduction in deaths resulting from attempted self-induced or other illegal abortions. Provincial regulations and the practices of hospitals and the medical profession rather than the abortion law itself have led to the inequities in its operation. The law is specific in setting out the procedure to be followed to obtain a therapeutic abortion and its definition of guidelines is broad enough to accommodate the circumstances under which it might be considered necessary to obtain an induced abortion;
- (iv) the abortion law limits the therapeutic abortion procedure to hospitals accredited by the Canadian Council on Hospital Accreditation or approved by provincial health authorities.
While in some instances hospitals of eight beds were accredited, additional provincial requirements for the rated bed capacity of hospitals which are eligible to establish therapeutic abortion committees varied from an undesignated number to 50 and 100 beds. There were a number of other additional provincial requirements for eligibility. Taken together these requirements set by provincial health authorities were a major factor which made a sizeable number of general hospitals ineligible to establish therapeutic abortion committees. When these requirements were added to the established medical custom that the therapeutic abortions are usually done by obstetrician-gynaecologists, the number of hospitals eligible to do the abortion procedure was effectively reduced to two out of every five hospitals in the nation;
- (v) in addition to the requirements set by provincial health authorities most hospitals where abortions are done have devel-

oped their own requirements to be met by patients prior to their applications being reviewed by therapeutic abortion committees. These requirements include one or more of: prior consultations with one, two or three physicians; a social service review; a residency requirement; tests for congenital deformities; contraceptive counselling; the consent of a spouse or partner; length of gestation; or interviews with patients by members of the therapeutic abortion committee. The use of these different requirements meant that some women seeking a therapeutic abortion had their applications speedily reviewed, while others in similar circumstances experienced considerable delay or had their applications rejected;

- (vi) delay by physicians is increasing risk and stress – on an average, women took 2.8 weeks after they first suspected they had become pregnant to visit a physician. After this contact had been made there was an average interval of 8.0 weeks until the operation was done. This kind of delay results in higher cost of health services, increases the stress on patients, and puts off the abortion until later in the pregnancy with the increased risk this can entail;
- (vii) there has been an absence of detailed reviews by provinces – the abortion law makes provision for review of the operation of the therapeutic abortion procedure by provincial health authorities. There have been no detailed reviews by the provinces of provincial regulations imposing conditions for the establishment of therapeutic abortion committees, the hospital requirements to be met by patients before their applications will be reviewed by a committee or the range of circumstances that may be seen to constitute danger to a woman's health. Despite nation-wide medical care insurance there is a financial deterrent for some women to obtaining a therapeutic abortion. One out of five women who had a therapeutic abortion paid extra medical fees and in some instances the performance of the operation was contingent upon payment of the extra fees. These charges were not evenly distributed among all abortion patients, but affected most of those women who were young, were less well educated, or were newcomers to Canada;
- (viii) women are leaving the country to obtain abortions – for every five women who obtained an abortion in Canada, at least one woman left the country for this purpose. About 9600 Canadian women obtained induced abortions in 1975 in the United States. Relatively few Canadian women went to other countries for the operation. Seven out of eight women in a small group of Canadian women surveyed who had abortions in the United States would have preferred to have had an

abortion in Canada, if they had known or had been told this option was available. Over half of these women said that their doctors felt they had little chance of getting an abortion in Canada, were morally opposed to assisting them, or were unwilling to refer them to a hospital where this procedure was done in Canada;

- (ix) special treatment centres are beneficial – there were fewer risks for patients at hospitals which had developed considerable specialization in doing therapeutic abortions. When this situation has occurred in the treatment of other health conditions in Canada it has on occasion resulted in the establishment of special treatment centres. This trend toward the specialization of abortion treatment has already partly evolved, although it has not been formally recognized by hospitals or provincial health authorities;
- (x) family planning information is lacking – Canadians lack accurate information about contraception. In terms of the allocation of public effort and resources, family planning has been only modestly supported. More money is spent on paying for the treatment and care of women who have induced abortions than on ways of seeking a reduction in the number of abortions and in providing more effective programmes of family planning and sex education. Existing sex education courses in schools, the work of public health programs and the efforts of voluntary associations when considered together have had little impact on the population as a whole;
- (xi) statistics concerning abortion are inadequate – the classification system for abortion requires extensive review in light of the different purposes for which information is compiled. There were almost as many abortions in Canadian hospitals which were classified under other headings as there were therapeutic abortions. These other abortions varied considerably in number among regions and different types of hospitals. Information is required about the use of contraceptive methods and the volume of induced abortions. Greater use could be made of much of the information collected which is neither fully analyzed nor made public. Fuller analysis of existing sources would provide more information for the public on the operation of the abortion law and the health consequences of abortion.

Sexual offences

The Law Reform Commission of Canada has published Working Paper No. 22 on “Sexual Offences”. The Working Paper proposes a new formulation of sexual offences as an alternative to the present provisions in the Canadian Criminal Code. The Commission states

that the reformulation has two objectives: first, to simplify and organise sexual offences; second, to bring the law more in line with present values and attitudes towards sexual offences and towards the use of the criminal law.

The Commission's principal recommendations are summarised below—

- (i) that the Criminal Code provisions relating to the offence of rape be reformulated to embody the notion of sexual assault as in the following—
 - (1) Every one who has sexual contact with a person without that person's consent is guilty of an offence of sexual assault.
 - (2) For the purposes of this section "sexual contact" includes any touching of the sexual organs of another or the touching of another with one's sexual organs that is not accidental and that is offensive to the sexual dignity of that person.
 - (3) In determining the sentence of a person convicted under this section, the judge shall consider all of the circumstances and consequences of the offence including whether there has been penetration or violence;
- (ii) that if the provisions against rape as presently defined in the Criminal Code were to be maintained, the exception which stipulates that forced sexual intercourse between spouses is not rape should be abolished in regard to spouses who are not cohabiting;
- (iii) that ss. 155 (buggery and bestiality) and 157 (gross indecency) of the Criminal Code be repealed. Instead forcible buggery and bestiality, as well as gross indecency would fall under the proposed sexual assault provisions, with the gravity of those acts determined on all the circumstances and more specifically on whether there has been penetration or violence;
- (iv) that s. 158 be repealed from the Criminal Code: since the exemptions outlined in s. 158 relate to ss. 155 and 157 which are to be abolished in part and incorporated into the sexual assault provision in part, the section becomes superfluous;
- (v) that the following reformulation or a similar reformulation be adopted regarding sexual relations with a young person under fourteen years of age—
 - (1) Every one who has sexual contact with a person under the age of fourteen years is guilty of an offence.
 - (2) For the purposes of this section "sexual contact" includes any touching of the sexual organs of another or the touching of another with one's sexual organs that is not accidental.
 - (3) In determining the sentence of a person convicted under this section the judge shall consider all of the circumstances and consequences of the offence including whether there has been penetration or violence.
 - (4) An accused is not guilty of an offence under this section because he or she has sexual contact with a young person under the age of fourteen years if, after the exercise of due diligence, proof of

which lies upon him or her, he or she believed the young person to be of the age of fourteen years or older;

- (vi) that the following reformulation or a similar reformulation be adopted regarding sexual relations with a person between the ages of fourteen and eighteen—
 - (1) Every one who has sexual contact with a young person fourteen years or older but under eighteen years of age who is dependent upon him or her or under his or her authority but is not his or her spouse, is guilty of an offence where the sexual contact is caused by the exercise of such authority or dependency.
 - (2) For the purposes of this section “sexual contact” includes any touching of the sexual organs of another or the touching of another with one’s sexual organs that is not accidental.
 - (3) In determining the sentence of a person convicted under this section the judge shall consider all of the circumstances and consequences of the offence including whether there has been penetration or violence.
 - (4) An accused is not guilty of an offence under this section if, after the exercise of due diligence, proof of which lies upon him or her, he or she believed the young person to be of the age of eighteen years or older;
- (vii) that s. 146(2) of the Criminal Code be repealed. Instead, in the absence of force, fraud or exploitation, sexual intercourse on the part of adults with fourteen to sixteen year old persons should continue to be prohibited as contributing to juvenile delinquency or be prohibited elsewhere in the criminal law;
- (viii) that s. 148 of the Criminal Code be repealed. Instead, sexual intercourse with a mentally handicapped person would be illegal only when that person was in fact incapable of giving valid consent. In such a case, a charge would be laid under the sexual assault provision on the basis of non-consent;
- (ix) that ss. 151, 152, 153(1)(a) and (b), and s. 154 of the Criminal Code be repealed. Instead, the Commission’s reformulation would provide for protection of young persons under the age of eighteen in dependency situations. For those whose employment opportunities are threatened by sexual exploitation, regulation should be left to labour legislation, with actions and referral to the appropriate Human Rights Commission;
- (x) that those offences under the Criminal Code sub-heading “Offences Tending to Corrupt Morals” dealing with defilement, corruption and procuring of children would better be dealt with under the proposed federal legislation to replace the Juvenile Delinquents Act as well as under provincial child welfare legislation and the laws relating to prostitution;
- (xi) that s. 142 be retained, but that the Criminal Code be amended so as to restrict publication or broadcast of material likely to lead members of the public to identify a rape victim, except with authorisation of the court, and maintain the

- anonymity of the accused unless he or she is convicted or the court otherwise authorises;
- (xii) that s. 147 of the Criminal Code be repealed. This exemption from criminal responsibility is unnecessary in the light of present laws, which provide that a person under fourteen cannot be tried in a criminal court;
 - (xiii) that s. 150 of the Criminal Code be repealed. Instead, incestuous behaviour would be prohibited under the reformulations suggested in this Paper dealing with sexual assault and sexual relations with young persons;
 - (xiv) that s. 169 of the Criminal Code (dealing with indecent acts calculated to offend others) be retained;
 - (xv) that s. 170 of the Criminal Code (dealing with nudity) be retained;
 - (xvi) that s. 171(1)(a), (c) and (d) (causing a disturbance, obstructing persons in a public place and disturbing the peace), s. 172 (obstructing clergy and disturbing a religious ceremony), and s. 174 (dangerous and volatile substances) be removed from the ambit of sexual offences and that the remaining sections in the Criminal Code under the subheading "Disorderly Conduct" be reformulated the better to reflect the organising principle of safeguarding public decency;
 - (xvii) that s. 171(1)(b) of the Criminal Code (which prohibits displaying indecent exhibits) should be retained to be modified in consonance only with changes, if any, in the law of obscenity;
 - (xviii) that s. 173 of the Criminal Code dealing with voyeurism remain substantively unchanged but undergo sentencing and procedural reform to recognise the sexually compulsive nature of the offence;
 - (xix) that s. 175(1)(e) of the Criminal Code be repealed subject to provisions allowing for a court to make an order so that a person convicted of a specific sexual offence can be restricted from access to certain specified public places. This order of restriction should be of limited duration;
 - (xx) that s. 195.1 of the Criminal Code (dealing with soliciting for the purposes of prostitution) apply equally to men and women;
 - (xxi) that should the Juvenile Delinquents Act be replaced by new legislation which does not prohibit contributing to juvenile delinquency, such a provision should be enacted in the Criminal Code.

Criteria for the determination of death

The Law Reform Commission of Canada has issued Working Paper No. 23 under the title "Protection of Life: Criteria for the Determination of Death". The Paper discusses death both as a medical and legal phenomenon, and reviews the experience of the U.S.A.,

Britain, France, Switzerland, Australia and the province of Manitoba, in this area.

The Paper includes extensive endnotes, a selected bibliography and selected definitions of death in other jurisdictions.

When discussing possible solutions, the Commission expresses the view that the problem is not purely theoretical; on the contrary, it is of real and practical importance, no less to the public and to society at large than to the lawyer and the medical and health professionals who frequently must confront it in their professional lives. Whatever solution is proposed ought to meet certain specific requirements. It should be flexible, allowing for adaptation to new developments in law and medicine, and it should try to reflect the consensus of a large segment of public and professional viewpoints, even though the prospect of a unanimously acceptable solution can be discounted as unlikely. Three types of approaches were possible—

- (a) treating the time and criteria of death as a purely medical problem, and leaving their determination to the exclusive jurisdiction of the medical profession;
- (b) leaving to the case law the task of gradually developing coherent criteria as to time and determination of death;
- (c) proceeding directly by way of legislation to define the criteria of death, and apply them in the adjudication of individual cases.

The Commission notes that their comparative review of experience in other jurisdictions had revealed that the legislative or regulatory solution seemed to have met with approval even in jurisdictions like the U.S.A. and Australia, or Manitoba, where the common law tradition might have favoured a case-by-case approach. Moreover the opposition to legislative intervention, in most cases, had been directed not against the principle itself but against its particular formulations. In other words, the discussion had now centered more around the content of the legislation than around the question of whether or not legislation was required. The Commission's tentative view was that a carefully drafted legislative intervention, designed to meet specific and clearly-defined objectives, was probably the best alternative. Its psychological and legal effects would be to dissipate fears shared by doctors, other medical personnel and the public. It would also eliminate the tensions between the insights of tradition and the imperatives of contemporary medicine. However, it would be wrong to opt for just any type of legislative intervention with an unspecified content. The parameters of the solution must be carefully set out according to the objectives and the general philosophy of the reform.

The Working Paper sets out (with a detailed commentary) the following objectives of the legislation the Commission presently has in mind—

- (i) the proposed legislation must avoid arbitrariness and give greater guidance to doctors, lawyers and the public, while

- remaining flexible enough to adapt to medical changes;
- (ii) the proposed legislation must not attempt to solve all the problems created by death, but only the problem of establishing criteria for its determination;
 - (iii) the one proposed piece of legislation must apply equally in all circumstances where a determination of death is at issue;
 - (iv) the proposed legislation must recognise only the standards and criteria of death: it must not define the medical procedure to be used, nor the instruments or procedures by which death is to be determined;
 - (v) the proposed legislation must recognise standards and criteria generally accepted by the Canadian public;
 - (vi) to remain faithful to the popular concept, the proposed legislation must recognise that death is the death of an individual person, not of an organ or cells;
 - (vii) the proposed legislation must not in practice lead to wrong or unacceptable situations;
 - (viii) the proposed legislation must not determine the criteria of death by reference only or mainly to the practice of organ transplantation.

The Commission sets out its provisional proposals for reform in the following terms—

The contemporary and shared conception of death is not as far removed from medical reality as is sometimes believed. Death is considered to be both the permanent and irreversible cessation of conscious and relational life of which the medical term is “irreversible coma”. Whole brain death is its sign. The difficulty in a certain number of cases stems from an apparent conflict between this state of fact and a visual perception of it. For instance, an irreversibly comatose patient, according to the Harvard test, can be considered dead even if still on a respirator and thus showing signs of respiration which under other circumstances would be tangible signs of human life. Yet these signs or movements are misleading for they indicate only an “appearance” of life.

The cessation of conscious and relational life must be permanent and irreversible, corresponding from a medical point of view, to a loss of consciousness and the absolute inability to regain consciousness. A patient under anaesthetic or with the symptoms of mere cerebral death, for instance, would not fall into that category. In the former case the patient has the capacity to regain consciousness.

In the latter case despite symptoms of apparant “brain death” such persons will continue to be capable of spontaneous cardio-respiratory functions until the centre controlling them (the brain stem), is or becomes irreversibly damaged. It would be wrong to consider them dead, even when it is certain that they will never regain consciousness. The ambiguity here comes from a misuse of terminology and of the terms “cerebral death” and “brain death”. “Brain death” is not only the irreversible loss of conscious and relational abilities and functions, but also the permanent cessation of spontaneous breathing and heart beat.

However, the simple fact that residuary electrical activities are still maintained in the spinal cord has never been considered by medicine as an obstacle to the declaration of brain death. These spinal reflexes are not included, as medical science readily accepts, within the meaning of "brain death" as we understand that term in the recommendation below.

The legislation must deal with concrete problems. The most frequent one is that of irreversibly comatose patients showing no signs of brain life or of spontaneous respiratory and cardiac functions but where the latter are assisted by modern technology. We believe that legislation should address itself to that specific problem. The case is one of whole brain death which cannot be ascertained by the usual method, that is, the cessation of cardiac and respiratory functions.

Finally, as we have already discussed before, the legislation should not contain the description of the medical procedures or techniques for determining death. At most, it can include reference to the norms generally accepted by contemporary medical practice.

Taking these factors into account, the Commission makes the following recommendations:

(1) *That the Parliament of Canada adopt the following text:*

A person is dead when an irreversible cessation of all that person's brain functions has occurred.

The cessation of brain functions can be determined by the prolonged absence of spontaneous cardiac and respiratory functions.

When the determination of the absence of cardiac and respiratory functions is made impossible by the use of artificial means of support, the cessation of the brain functions may be determined by any means recognized by the ordinary standards of current medical practice.

(2) *That the Government of Canada enter into agreements with the Provincial Governments to insure the adoption of this text or a similar one throughout the country for all legal purposes in order to achieve suitable uniformity.*

Sterilization and the mentally handicapped

The Law Reform Commission of Canada has published Working Paper No. 24 on "Sterilization; Implications for Mentally Retarded and Mentally Ill Persons" as part of its Protection of Life Series. [Working Paper No. 23 in this series—"Criteria for the Determination of Death" was summarised at (1979) 5 C.L.B. 806.] An introduction explains that in the Paper the Commission specifically deals with the sterilization of two groups of persons—those who are mentally ill and those who are mentally retarded. These two categories of persons were chosen as the focus of the Paper for a number of reasons. First, because of a legislative history which particularly selected out these groups as being exempt from otherwise mandatory consent requirements. Secondly, because of a general

attitude towards such persons as being excluded in one way or another from the rights and responsibilities of other members of society. And thirdly, because of increased public concern about lack of control of the reproduction of mentally handicapped persons consequent upon the adoption of policies of deinstitutionalisation.

The first section of the Paper examines the medical, social, and legal definitions of mental illness and mental retardation. In the second section the positions that have been taken concerning the sterilization of these groups are presented along with a detailed examination of the social, bio-medical, and moral arguments that have been advanced. The issues that are raised by non-consensual sterilization are outlined in the third section, followed by a discussion of whether there are conditions under which non-consensual sterilization can be justified from the point of view of the criminal law. In the final section of the Paper, legislative alternatives are analysed, and guidelines proposed.

Set out below, is the Commission's own summary of its provisional proposals—

1. That the legal basis for procedures for sterilization be based on the following classifications:
 - (a) *Voluntary therapeutic sterilization*: this would be any procedure carried out for the purpose of ameliorating, remedying, or lessening the effect of disease, illness, disability, or disorder of the genito-urinary system, and with the fully-informed consent of the patient.
 - (b) *Emergency therapeutic sterilization*: this would be the same procedure as in (a) (above) carried out in a medical emergency and where the patient or next-of-kin is unable to give consent.
 - (c) *Voluntary non-therapeutic sterilization*: this would be a safe and effective procedure resulting in sterilization when there is no disease, illness, disability, or disorder requiring treatment but the surgery is performed, with the fully-informed consent of the patient, for:
 - (i) the control of menstruation for hygienic purposes;
 - (ii) the prevention of pregnancy in a female; and
 - (iii) prevention of ability to impregnate by a male.
 - (d) *Involuntary non-therapeutic sterilization*: this classification would be for the same procedures as in (c) (above) but where the person is not competent to give consent.
2. That therapeutic sterilizations fall within the broader provisions respecting medical treatment proposed in the Law Reform Commission's forthcoming Working Paper on treatment in the criminal law.
3. That, for the purpose of criminal law, mentally handicapped persons who understand the nature and consequences of the sterilization procedure and are under no coercion or duress should have the same options to consent to, or to refuse, sterilization as other persons.
4. That, for the purpose of criminal law, a judicial hearing be held to determine competence to consent to sterilization according to the

following criteria and procedures:

- (a) a hearing be initiated to ascertain whether an individual has the capacity to consent if any one of the following circumstances prevail:
 - (i) the presumption of an individual's capacity to consent is questioned;
 - (ii) the request for sterilization has emanated or can be presumed to have emanated from a third party;
 - (iii) there is any indication that the individual requesting his or her own sterilization is specially susceptible to coercion or undue influence to consent to such treatment.
 - (b) the hearing be held in the Unified Family Court; however, in the absence of such a court, it be held in a superior, county or district court;
 - (c) the finding of the capacity of the individual to consent be dependent on the individual's ability to understand the nature and consequences of the medical procedure of sterilization;
 - (d) the individual be represented at such hearings by a person who, the court is satisfied, will provide independent advocacy on behalf of the individual;
 - (e) a right of appeal to a superior appellate court be provided by law;
 - (f) if the court rules that an individual's decision to be sterilized or not to be sterilized is valid, the particular choice of the patient may be relied upon by the physician as discharging his or her responsibility to obtain and record the proper consent of the patient according to usual practice;
 - (g) if the court rules that an individual is incompetent, an advocate be appointed by the court to act on behalf of the individual for any sterilization authorization board hearing;
 - (g) all findings, judgments, and orders of the court in competence hearings pertaining to sterilization be filed with the sterilization authorization board.
5. That in any case where there is no valid consent and in the case of any person younger than sixteen years, no non-therapeutic sterilization be permitted except with legal authorization provided by a board established for that purpose and operating according to the following criteria and procedures:
- (a) any person appearing before the board be represented by an independent advocate judicially appointed or acceptable to the board;
 - (b) the board be composed of a multidisciplinary team of persons qualified to evaluate the medical, social, and psychological benefits of sterilization to the individual and to determine if there is a compelling interest to justify the operation;
 - (c) appointments to the board be made by the provincial minister or ministers responsible for the mentally handicapped from a list prepared by the government authority responsible for persons who are minors or incompetents in the applicable province;
 - (d) appointments to the board include:
 - (i) persons capable of assessing relevant medical and psychological evidence;

- (ii) persons such as advocates capable of assessing social and ethical evidence, and lay persons with expertise in mental handicap or human rights;
 - (iii) a lawyer with the jurisdiction to determine questions of law arising in any proceeding.
- (e) the board be required to ensure that the following minimum criteria are established before authorizing a sterilization procedure:
- (i) the individual is probably fertile, and there is some evidence to that effect;
 - (ii) the individual is both of child-bearing age and sexually active and other forms of contraception have proved unworkable under the particular circumstances of each case or are inapplicable so that pregnancy is a likely consequence;
 - (iii) there is more compelling evidence than age or mental handicap alone that childbirth itself or childrearing itself will probably have a psychologically damaging effect on the individual;
 - (iv) the sterilization will not in itself cause physical or psychological damage which will be greater than the beneficial effects to the individual, based on a comprehensive medical, psychological and social evaluation;
 - (v) the views of the individual have been taken into account in the determination regarding whether or not to sterilize; and
- (f) the board be required to maintain a transcript of the proceedings and submit reasons for its decision including the basis of its conclusions of fact and consideration of other alternatives,
- (g) a right of appeal from the decision of the board be provided by law on matters of both fact and law,
- (h) an independent, external evaluation of the sterilization authorization boards be carried out every two years and the evaluation procedures be placed within the jurisdiction of human rights commissions.

Medical treatment and criminal law

The Law Reform Commission of Canada has published Working Paper No. 26 in its Protection of Life Series under the title "Medical Treatment and Criminal Law". The Paper points out that a comprehensive study of potential criminal liability for the administration of treatment had not previously been undertaken. A preliminary examination had revealed an anomaly between a plain interpretation of the Canadian Criminal Code and contemporary medical practice particularly in the terminal treatment situation.

In the Commission's view the criminal law provides a basic system of fundamental values to guide human activity and is thus a likely instrument to reflect contemporary social thought on biomedical issues. Concern had been expressed that advancing technology, providing control over life and death, could be dictating the

prerequisites to treatment, rather than treatment being decided on the basis of individual rights within a context of social review.

The Paper undertakes a basic examination of the content and policy of the present criminal law as it relates to medical treatment. It then evaluates that policy in the light of modern thought and development. The Commission favours the drafting of a new offence for the wrongful administration of treatment, the substance of which would be based on the recommendations contained in the Paper.

The Commission thus summarises its provisional recommendations—

In this Working Paper, the Law Reform Commission has primarily sought to preserve societal interests in the preservation of life, health and personal integrity and in keeping dynamic and competent healing professions. Through an examination of the present law and of contemporary medical and ethical standards, it has been shown that the criminal law does not accurately reflect either the expectations that individuals have when they seek and receive treatment, or the assurances of immunity that professionals desire before undertaking treatment. A reconciliation of this differential can be achieved through changes in the present law according to the following principles.

The administration of treatment by qualified personnel in the pursuit of continuing life and health is to be differentiated from other intrusive acts upon the body of another. The value of treatment makes its administration special among offences against the person. However, there is still the need to assure that this everyday activity be performed according to precise and ascertainable criteria in the Criminal Code.

Individual rights to security of the person and privacy must be protected by the requirement of knowledgeable consent and recognition of the right to refuse treatment. If, through either legal or factual disability, an individual is unable to consent, his/her interests must be fairly and accurately represented and protected according to usual legal procedures. However, there are situations, such as an emergency, when assisting personnel should be able to act to preserve life and health despite the absence of consent.

The differentiation of treatment from other offences against the person is based primarily on the recognition of the competence and high ethical standards of our healing professions. At the same time, realistic expectations of standards of professional care must be implemented. This involves the adoption of a flexible standard based on reasonableness and on the particular circumstances of each case.

Because of the dependence of individuals upon health care services, the legislators have the obligation to ensure that essential needs will be met, especially if an individual is unable to secure the service himself. This obligation has developed to professionals who willingly undertake to provide treatment; but the role of legislators continues. Thus, the Criminal Code has traditionally required persons to provide treatment if they have undertaken to do so or if they are responsible for disabled persons. These obligations should be maintained and expanded, if necessary, to guarantee all Canadians a basic security of the person.

These broad principles may best be effectuated through implementation in the Criminal Code of the following recommendations:

- (1) that the administration of treatment continue to be regulated by the Criminal Code but be distinguished from certain other acts of application of force which are considered to be criminal;
- (2) that the concept of treatment be recognized for the purposes of the Criminal Code as a process oriented towards the therapeutic alteration of individual health conditions resulting from disease, illness, disability or disorder;
- (3) that treatment and non therapeutic interventions be distinguished by the criminal law, the former being considered as prima facie legal;
- (4) that the provisions of the Criminal Code apply to non-therapeutic interventions as for any other acts involving the application of force and wounding, but that a defence be available to prevent certain of them from constituting a criminal offence;
- (5) that individual consent continue to be recognized as one of the essential conditions of the legality of the administration of treatment;
- (6) that what constitutes a legally valid consent to treatment, for the purposes of the criminal law, be determined according to the standards evolved by case law;
- (7) that treatment shall not be administered without the consent of the individual treated, unless there is or has already been a finding of incompetence or another specific exception recognized by law;
- (8) that the judicial finding of incompetence be made by a Superior, a District or a County Court;
- (9) that decisions regarding non-therapeutic interventions on incompetents, be made by a provincial board established for this purpose;
- (10) that the right of a competent adult to refuse treatment be specifically recognized by the Criminal Code;
- (11) that treatment shall not be administered against an individual's refusal unless there is a finding of incompetence or an exception recognized by law;
- (12) that treatment can legally be administered to an individual without the necessity of obtaining his consent, in a situation of emergency, where that individual is incapable to express his consent;
- (13) that the right of a competent individual to refuse treatment in a situation of emergency be recognized;
- (14) that the acceptable minimum standard required from a qualified person in the administration of treatment be the knowledge, skill and care of a competent similarly qualified person performing the same act in similar circumstances;
- (15) that the standard of reasonable knowledge, care and skill recommended above apply also in emergency situations, taking into consideration the particular circumstances of the case;
- (16) that the acceptable minimum standard for the unqualified person in the administration of treatment be that of the reasonable, ordinary person and not that of the qualified person;
- (17) that where a person holds himself out as having certain qualifications and where the public or the individual treated rely on these qualifications, that person be judged according to the standard of the qualified person he represented himself to be;
- (18) that the substance of the present provisions of the Criminal Code concerning duties tending toward the preservation of life be retained;

- (19) that these provisions be extended to apply also where there is a danger of permanent injury to a person's health;
- (20) that the Criminal Code make separate provisions for the general duty of reasonable knowledge, care and skill in the performance of dangerous acts and for the duty of reasonable knowledge, care and skill, in the administration of treatment by qualified professionals;
- (21) that the duty of reasonable knowledge, care and skill apply upon the undertaking of the administration of treatment;
- (22) that an exception to the duty to undertake or to continue a treatment be recognized when necessary resources are not available;
- (23) that the Criminal Code recognize the general duty to render assistance to an individual in danger, where the life or health of that person is seriously threatened and the circumstances are such that the person is aware of the emergency and can provide immediate assistance without undue hardship to himself.

Consent to medical care

The Law Reform Commission of Canada has published a Study Paper in its Protection of Life Series under the title "Consent to Medical Care". Chapters in the Study deal with the doctrine of informed consent; how are consent in the medical relationship and the underlying principles of autonomy, inviolability and privacy affected by "disability" of the patient or research subject; and criminal law aspects of consent to medical interventions.

The major specific recommendations made in the Paper are thus summarised by the author—

A. At a conceptual level

1. That both criminal and civil law controls and remedies be retained in the area of consent to medical care.
2. That the rights to autonomy and inviolability be distinguished from each other and recognized.
3. That for the purposes of legal analysis and precedent, a distinction be made between the traditional doctrine of consent and the new doctrine of "informed" consent. The latter being wider will encompass the former, though the opposite proposition is not true.
4. That a distinction be made between the patient's consent to the medical contract and his consent to medical care.

B. At a practical level

1. That the general rule should be that the patient's "informed" consent to all medical procedures must be obtained. This means that information about the nature of the proposed procedure and its attendant risks which a reasonable man in the patient's position would want to know, or which the doctor knows the particular patient would want to know, must be explained to the patient. In general the less necessary the procedure and the greater the risks, the more stringent is the content of the duty of disclosure. The doctor may rely on the patient's consent as being valid if there is apparent, subjective understanding of this information by the patient.

2. That the above general rule may be cut down in its operation by application of the doctrine of "therapeutic privilege". This means that in a particular case telling the patient some, or all, of the information required to be given under the general rule, would, *in itself*, harm him physically or mentally. It is not sufficient for operation of the privilege that the required disclosure would affect the patient's decision-making. Further, the privilege being an exception is to be construed narrowly, and being a justification the burden of proof of its applicability is on the person relying on it, namely the doctor.

3. That information be disclosed and consent obtained in as non-coercive a manner, language and situation as is possible. Except in very rare circumstances, deception is unacceptable. Further, there must be a constant concern to protect and be sensitive to the rights of privacy of the patient.

4. That both the necessity to inform the patient and to obtain his consent be seen as continuing requirements.

5. That it should be emphasized that the purpose of the doctrine of "informed" consent is protection of the patient.

6. That in life threatening situations when the patient refuses treatment, it is a policy decision as to whether the requirement for consent should be dispensed with by the law. In emergency situations where it is impossible to obtain consent a defence of necessity should apply.

7. That consent be regarded as a necessary, but not sufficient, justification for a medical intervention.

8. That consent to any significant medical intervention be obtained before a third party witness and be evidenced in writing.

9. That the coercion naturally present in the doctor-patient relationship, and especially the doctor-dying-patient relationship, be recognized.

10. That with respect to consent to medical interventions on children:

- (a) the "mature-minor" rule should be clearly established;
- (b) the term "proxy consent" should be abandoned and replaced by either parental authorization or permission;
- (c) the parent may consent to therapy on the child not yet within the scope of the "mature-minor" rule. The child should have a right of objection or veto, but this may be overridden by the parent with justification;
- (d) except in extremely rare circumstances a parent may not consent to non-therapeutic, or more than minimal risk personally non-beneficial interventions on the child;
- (e) special protection must be given to institutionalized children with respect to consent to medical interventions on them.

11. That with respect to consent to medical interventions on foetuses:

- (a) where therapy is involved the same rules apply as for non-discerning children;
- (b) where the intervention is non-therapeutic for the foetus but directed at therapy for the mother the mother's consent is adequate;
- (c) in all other cases any rules on consent should recognize the mother's, and possibly a medical research physician's, conflict of interest.

12. That with respect to consent to medical interventions on mental incompetents:

- (a) their consent should be sought to the extent that they are capable of giving it;
 - (b) in cases where the mental incompetent is factually incapable of consenting the same rules should apply as suggested for non-discerning children, including institutionalized children.
13. That with respect to medical interventions on prisoners;
- (a) the prisoners' "informed" consent to all medical treatment must be sought. The only exception to treating a prisoner without consent is where he has a disease state threatening the health or well-being of other prisoners;
 - (b) a very high degree of care must be taken to counteract the coercive effects on consent, of the institutionalization and deprivation suffered by prisoners.

Sanctity of life

The Law Reform Commission of Canada has published a Study Paper as part of a research project it has undertaken on protection of life issues in the biomedical context. The Paper, under the title "Sanctity of Life or Quality of Life in the Context of Ethics, Medicine and Law", has been prepared by Edward Keyserlingk, the co-ordinator of the project.

The author explains that although the Paper is written in the context of a law reform project, it is not primarily a legal analysis, nor does it make, at least in legal language, specific law reform proposals. Its purpose is that of a background paper, and its perspective is largely ethical (philosophical and religious). It seeks to do four things. First of all, to describe and evaluate from that ethical perspective some of the major views and trends today on those related and somewhat elusive subjects of "sanctity of life" and "quality of life" in the medical context. Secondly, to make some reasoned choices and proposals. Thirdly, to indicate some of the implications and priorities of the ethical and value analyses and proposals for law and law reform. Fourthly, to indicate and encourage the interaction of law and morals, yet draw attention as well to the differences in perspectives and priorities.

Detailed conclusions are contained in the body of the 224 page study. Part IV of the Paper entitled "Conclusions: Some Priorities for Public Policy and Law" is set out below—

Preamble

(1) On the one hand law is entitled to address itself to the issues dealt with in this paper. There are important individual and societal values to be underlined, rights and duties to be protected, public debate to be invited and formal decision-making and conflict-resolution processes to be used and evolved. All of these, in part at least, are the proper tasks of

the legislative forum (Parliament and Provincial Assemblies) and of legal justice (laws and courts). The former to focus public debate and formulate public policy, the latter to dramatize and articulate the ideals of legal justice—impartiality, objectivity, consistency, fairness and equality.

(2) But on the other hand (as noted in the Introduction), the mere presence of endangered values and rights or of immorality does not necessarily mean in every instance that law should be brought more directly and frequently into play. In some instances it may be too blunt, too insensitive to better the situation. More law and legal process may in some instances only further bureaucratize and depersonalize a medical system which, by general consensus, has already gone too far in that direction.

Wherever possible there should be room for both an ethic of rights and an ethic of responsibility in any law reform proposal. The general maxim that law should play a limited, “last resort” role is applicable to our issues. In many instances there may be people, processes and socializing agencies at more fundamental, more immediate levels better able to encourage responsibility and protect the rights in question. About any particular medically oriented issue there is therefore some onus on legislators and law reformers to establish not only that this or that particular law is better than another, but that law itself belongs here, is likely to do a better job than another and perhaps less intrusive means or at least likely to play a useful supplementary role.

(3) When it comes to the formulation or re-formulation of particular public policies, laws or law reforms in this area, an essential and primary consideration is the determination of just where the real problem is, which particular issue should be regulated or legislated to best cope with a perceived problem and endangered rights, and which issues if directly regulated or legislated in might actually finish by only further depriving these or other patients of the very rights one seeks to better protect.

(4) Legislation or any other form of social policy enacted or reformed in any of the areas discussed in this paper, should not seek to provide for physicians a form of “no fault” immunity from prosecution or civil suits. Even if such legislation were feasible, it would not likely promote the high standard of care encouraged by continuing to allow all such medical decision-making to be reviewable by courts, and by continuing to allow physicians (and others involved in these decisions) to be responsible for their decisions and actions. Rather than seeking full legal immunity, physicians should continue to accept the responsibility of sometimes allowing a patient to die by ceasing or not beginning useless or burdensome-to-patient treatment, and at other times accept the responsibility of not neglecting patients who are treatable and able to be cared for, even though their quality of life is minimal. In any clarification of responsibility and liability in these matters, it should be stated or assumed that the sanctity of life principle imposes a greater burden of proof on those who would allow to die than on those who would continue to treat.

(5) In view of the fact that this paper was not intended to be an in-depth analysis and evaluation of existing law, the specifics which follow are not necessarily meant to be proposals for law reform. In some instances at least, the law may already adequately reflect the (moral)

concerns expressed in these specifics. That is for others to determine. They are offered only as a summary and selection of some of the moral considerations dealt with in this paper, those which ought to be central concerns in public policy, law and law reform as regards the protection of both the sanctity of life and the quality of life.

Specifics

(1) Public policy and law should (continue to) affirm and protect the absolute value, equality and “sanctity” of human life, and continue to prohibit (active) euthanasia for any reasons. But at the same time, it should make explicit that what it is affirming and protecting is the absolute value of human personal life, of persons.

(2) Public policy and law should acknowledge that sometimes death of the person may and will have to be established by a quality of life criterion, namely that of irreversible brain death (either of the whole brain or of the cerebral centres). And this even though human biological life in the form of circulatory and respiratory function continue, either spontaneously (in the case of cerebral death only) or artificially (in the case of whole brain death). It should be explicitly affirmed that physicians have no legal liability for not initiating or for ceasing “life” saving or “life” supporting treatment in such cases of biological human life alone, assuming of course that all the necessary tests have been carefully made.

(3) Public policy and law should acknowledge that even in the presence of human personal life there can exist good quality of life reasons for not initiating or for ceasing medical treatment. Applied to both competent and incompetent patients the determinative criterion is the patient’s perspective, the patient’s benefit. In the case of competent patients, they should be free to interpret and determine what is to their benefit by themselves, refusing treatment on any grounds they wish. Decisions by others for incompetent or incoherent patients should be made according to the “reasonable person” test, determining both whether the treatment is useful and whether it would occasion serious patient-centered objections or burdens. Physicians who cease or do not initiate life saving or life supporting treatment either because the treatment is not useful, or would occasion a serious patient-centered objection, or both, should not incur legal liability.

(4) But if quality of life criteria are to be given any normative value in public policy and law for purposes of determining whether a particular medical treatment is (or was) useful as well as not excessively burdensome to the patient, then two serious dangers must be protected against. It is by no means certain that adequate protection can in fact be included in such laws and public policies.

The first danger would be to leave the term “quality of life” too vague and general, simply allowing “reasonable medical judgment” to determine the meaning and normative weight to be given to quality of life factors in given cases. Unless relevant public policy and law can articulate and defend some substantive quality of life criteria, the mere recognition of such criteria in general without any further specificity would probably be at best unhelpful, and at worst dangerously vague.

In other though related matters laws have usually been formulated in somewhat general terms, leaving it to the particular profession to deter-

mine and add the specifics to general (legal) standards such as "reasonable care and skill". But in the matter of quality of life standards in the medical context, this (traditional) manner of formulating relevant law would probably be inadequate. "Quality of life" as a norm for life and death medical decision-making is too elastic a term, and too much in need of public review and control to be "legalized" without carefully drawn definitions and parameters. Whether laws can in fact be moved in this direction in this matter is for others to decide.

The second danger in such a recognition would be to articulate quality of life criteria which have not been purged of any connotation of social utility, relative worth or merely subjective considerations. Such criteria would expose incompetent and non-competent patients to more risks than benefits. Therefore the criteria should not only be substantive, but as objective and patient-oriented as possible.

The two criteria suggested in this paper merit consideration. The first considers the patient's capacity to experience and relate. The second considers the intensity and the susceptibility to control of the patient's pain and suffering. If, even with treatment and loving care, a reliable diagnosis and prognosis indicates that there is not now and apparently never will be even a minimal potential capacity to experience and relate, or that the level of pain and suffering will be prolonged, excruciating and intractable, then and only then would a decision to cease or not initiate life supporting or life saving treatment for an incompetent or non-competent patient be beneficial and acceptable.

(5) It should be clear and explicit in public policy and law that all patients have the right to refuse treatment by withholding consent, even if death will inevitably result. This applies to both competent and incompetent patients. The competent should make such decisions for themselves, and for the incompetent or incoherent, a previously chosen agent, family member, or court appointed guardian (and in that order of authority) would exercise that right for them. The mere refusal of a "dying-prolonging" treatment by a competent patient should not be used as grounds for declaring a person incompetent.

(6) In the case of presently incompetent or incoherent (but formerly competent and coherent) patients, it should be clearly recognized in public policy and law that their wishes regarding initiation, continuation or cessation of treatment which were clearly and knowledgeably expressed when competent and coherent, are to be now respected.

(7) Since, as this paper has argued, medical (curative) treatment may be stopped under certain circumstances, though care or comfort continue to be morally obligatory, the law should recognize and define as clearly as possible the distinction between what I have called "(curative) treatment" and "(palliative) care". Clarity in this regard would make it possible to establish with (more) accuracy in what sorts of circumstances it is the physician's duty to treat as well as care, and when no such duty to treat exists, but only one of caring.

(8) Knowledgeable and informed medical decisions by patients or proxies to initiate, continue or cease treatment on the basis of quality of life considerations are impossible without full information and understanding as to the diagnosis, prognosis, risks and benefits involved. Such information and understanding is obviously all the more crucial in decisions involving life supporting or life saving treatment. Therefore

any relevant public policies and legislation concerning medical decision-making of this nature should be clear and unambiguous as to the patient's right not only to withhold consent, but also to be fully and clearly informed, and the physician's duty to so inform. When necessary of course, both the patient's right to be fully informed and the patient's right to withhold consent, will be exercised by a proxy (or proxies) for that patient.

Canada – Manitoba

Transexuals and birth certificates

The Manitoba Law Reform Commission has recommended that transexuals born in the province and certifiable in their sex changes be granted amended birth certificates showing their preferred sex. The two-year study had been initiated at the request of transexuals fearful that if convicted of a crime they might be sent to a correctional institute for inmates of an inappropriate sex.

The Commission has suggested the establishment of an ad hoc committee of specialists to prove the gender of an applicant.

Limitation of actions by children and disabled persons

The Law Reform Commission of Manitoba has published a Working Paper on "Limitation of Actions by Children and Disabled Persons". The Working Paper deals with the following four inadequacies in the province's Limitation of Actions Act (C.C.S.M. Cap.L150) highlighted in part by the decision of the Manitoba Court of Appeal in *Mumford v. Children's Hospital of Winnipeg et al* [1977] 1 W.W.R. 666 (Man. C.A.) –

- (a) the immunity of the medical profession and certain other professions and interest groups from the special protection given to children and disabled persons,
- (b) the uncertain duration of the extension permitted by those special provisions,
- (c) the peculiar difficulties of applying the special provisions in the case of disabled persons,
- (d) the uncertainty of some of the provisions relating to discretionary time extensions under Part II of the Limitation of Actions Act.

The Commission's provisional recommendations are summarised below –

- (i) the special time extension provision for children and disabled persons contained in s. 9 of the Limitation of Actions Act should be extended to apply to all sections for personal injury, whether covered by s. 3(1) of the Act or by the various statutes referred to in s. 6 of the Act, and to actions under the Fatal Accidents Act;

- (ii) the special time extension provisions for children and disabled persons contained in ss. 9 and 58(1) of the Limitation of Actions Act should be re-worded to ensure that an action may be commenced at any time during the period of infancy or disability;
- (iii) although some members of the Commission would prefer that the special time extension provision for children and disabled persons should be discretionary, the majority are presently of the view that it should remain an absolute right;
- (iv) there would be little to be gained from permitting potential defendants to demand the commencement of actions during the period of infancy or disability;
- (v) the special time extension provision for children and disabled persons should not be restricted to cases where the plaintiff is not in the custody of a parent, guardian, committee or trustee;
- (vi) the special time extension provision for disabled persons under s. 9 of the Limitation of Actions Act should be available for disabilities occurring during the normal limitation period as well as for those in existence when the cause of action arose;
- (vii) the definition of "disability" should be expanded to cover all forms of mental or physical impairment which render persons incapable or substantially impeded in the management of their affairs;
- (viii) the discretionary time extension provisions in Part II of the Limitation of Actions Act should be clarified to ensure that a subjective standard is applied by the courts in determining, in accordance with s. 21(7), whether material facts were within the knowledge of the plaintiff;
- (ix) although some members of the Commission believe that failure to understand one's legal rights should be treated as a "material fact" for the purpose of an application for a discretionary time extension under Part II of the Limitation of Actions Act, the majority are presently of the opinion that it should not.

Mental health legislation

The Law Reform Commission of Manitoba has published Report No. 29 under the title "Emergency Apprehension, Admissions and Rights of Patients under 'The Mental Health Act'". The Commission concludes that law of Manitoba in this area, contained in the Mental Health Act (C.C.S.M., Cap.M.110) has many shortcomings. The Report makes reference to the limited role of the police in the administration of this legislation and, in general, the unsatisfactory emergency apprehension procedures it now provides. It touches on the rather extensive and far-reaching power of the Director of Psychiatric Services; the limited responsibility in tort of hospital

personnel; the lack of attention to the civil rights of the individual; the possibility of indefinite committal which this legislation contains, and its general inattention to the principles of natural justice.

The Report acknowledges and considers the views of the medical profession as they have thus far been expressed to the Commission. The Report compares Manitoba's Mental Health Act with the legislation in Ontario and Alberta, as well as with that in the other Canadian provinces and some American jurisdictions.

The Report states that on the whole, the Commission was impressed by the Ontario and Alberta statutes and the solutions in them to the problem of reconciling the interests of society in preserving safety and health and safeguarding the liberty of the individual. The Commission believed that with some modification such provisions would be appropriate for enactment in Manitoba. The Act should provide some periodic or easily accessible review procedure, similar to that provided in Ontario. The criteria for committal should be made more precise; and strict time limits should be set on the period of confinement. The proposals are intended to provide a comprehensive scheme for (1) the admission of persons to mental institutions, (2) the periodic review of these patients, and (3) their release, the basis of which is a fair balance of the interests of the mentally ill with those of the public at large.

The following is the Commission's summary of their Report's recommendations—

1. A person should be admitted to a psychiatric facility for compulsory observation and assessment, only upon:
 - (a) the medical certificate (called a "Medical Order for Psychiatric Assessment") of a single medical practitioner or psychiatric nurse duly qualified or registered to practise in the province; or
 - (b) the order (called a "Judicial Order for Psychiatric Assessment") of a provincial court judge; or
 - (c) the emergency apprehension and conveyance to the hospital by a peace officer designated under the Criminal Code (called an "Emergency Police Apprehension for Psychiatric Assessment").

The procedure for voluntary admission to a psychiatric facility for observation and assessment should be handled by the facility like any other voluntary admission.

2. (a) A "Medical Order for Psychiatric Assessment" should be signed and dated by the practitioner or psychiatric nurse who personally examined the person named in it, no later than within seven days of the examination and the medical order should cease to have any force and effect unless it is presented to the hospital in question within seven days of the time of the signature of the practitioner or psychiatric nurse.
- (b) The practitioner or psychiatric nurse who signs a "Medical Order for Psychiatric Assessment" should be required to state his or her belief based on reasonable grounds that the

- person in respect of whom the order is made
- (i) has threatened or attempted or is threatening or attempting to cause bodily harm to himself;
 - (ii) has behaved, or is behaving violently towards another person or has caused or is causing another person to fear bodily harm from him; or
 - (iii) has shown or is showing a lack of competence to care for himself,
- and in addition, that the person is apparently suffering from mental disorder of a nature or quality that is likely to result in
- (iv) serious bodily harm to the person;
 - (v) serious bodily harm to another person; or
 - (vi) imminent and serious physical impairment of the person.
- (c) The practitioner or psychiatric nurse who signs a “Medical Order for Psychiatric Assessment” should be required to state the facts upon which he/she bases his/her belief as above, that the person is apparently suffering from mental disorder. The practitioner or psychiatric nurse should also be required to distinguish as between those facts observed and those communicated to him/her.
3. (a) A valid and subsisting “Medical Order for Psychiatric Assessment” should be sufficient authority for anyone to take the person who is the subject of the order into custody and to convey the person to a psychiatric facility forthwith.
- (b) Upon receipt by a peace officer of a valid and subsisting “Medical Order for Psychiatric Assessment”, the officer should be required to do all things necessary to take the person who is the subject of the order to a psychiatric facility forthwith.
4. (a) When information upon oath is brought before a provincial court judge or magistrate that a person
- (i) has threatened or attempted or is threatening or attempting to cause bodily harm to himself;
 - (ii) has behaved or is behaving violently towards another person or has caused or is causing another person to fear bodily harm from him; or
 - (iii) has shown or is showing a lack of competence to care for himself,
- and in addition, based upon information before him the judge or magistrate has reasonable cause to believe that the person is apparently suffering from mental disorder of a nature or quality that likely will result in
- (iv) serious bodily harm to the person;
 - (v) serious bodily harm to another person; or
 - (vi) imminent and serious physical impairment of the person,
- the provincial court judge or magistrate should be empowered to issue a “Judicial Order for Psychiatric Assessment” of the person.
5. Where a peace officer has reasonable cause to believe that a person

- (i) has threatened or attempted or is threatening or attempting to cause bodily harm to himself;
- (ii) has behaved or is behaving violently towards another person or has caused or is causing another person to fear bodily harm from him; or
- (iii) has shown or is showing a lack of competence to care for himself,

and in addition the officer is of the opinion that the person is apparently suffering from mental disorder of a nature that likely will result in

- (iv) serious bodily harm to the person;
- (v) serious bodily harm to another person; or
- (vi) imminent and serious physical impairment of the person,

and that it would be dangerous to proceed for a "Judicial Order for Psychiatric Assessment", he should be enabled to make an "Emergency Police Apprehension for Psychiatric Assessment" of the person.

6. (a) A peace officer who takes a person into custody either pursuant to a medical order, judicial order, or emergency police apprehension for psychiatric assessment should be required to convey the person forthwith to a psychiatric facility for observation and examination.
- (b) A patient who arrives at a psychiatric facility pursuant to a medical order, judicial order, or emergency police apprehension for psychiatric assessment should be accepted by the facility for psychiatric observation and assessment.
- (c) A peace officer who takes a person in custody to a psychiatric facility should be required to remain at the facility and retain custody of the person until the facility accepts him for observation and assessment.
7. (a) A person who arrives at a psychiatric facility pursuant to a medical order, judicial order or emergency police apprehension for psychiatric assessment should be examined forthwith upon his arrival at the facility, but in any event not later than within 48 hours, by a psychiatrist duly qualified to practise in the province.
- (b) Although medical officers on staff at psychiatric facilities should be empowered to detain, restrain and observe a person once he or she is admitted for assessment, no general power should be invested in the medical personnel to treat a person during the 48 hour period in which he/she is detained, except to the extent that it is necessary for the purpose of relieving immediate danger to the admitted person or to others, or to the extent that it is necessary to permit the required psychiatric assessment to be made.
- (c) A person who, following psychiatric assessment, is not certified for admission to the facility either as a voluntary or as a compulsory patient is to be released forthwith, but in any event within 48 hours of his arrival.
8. (a) As soon as possible after his arrival at a facility for psychiatric assessment, a person is to be advised, in simple language, of

- his rights under the legislation, in particular the reasons and period of his detention, his right of release and his right to apply to the provincial Mental Health Review Board for a review. Efforts to contact next-of-kin should be required to be made at this time.
- (b) An interpreter should be provided where there is language difficulty.
9. (a) A person may be admitted to a psychiatric facility as a voluntary patient where the psychiatrists conducting the examination for assessment are of the opinion that he suffers from a mental disorder of such a nature that he is in need of the treatment provided in the facility and that he is suitable for admission as a voluntary patient. The method by which the patient arrives at the psychiatric hospital should not determine his status.
 - (b) A voluntary patient should have the right to be discharged within a reasonable period of time following his request for discharge unless there are already in existence at that time two admission certificates duly completed for his compulsory committal. Eight hours would be a reasonable period of time in these circumstances.
 - (c) Every member of the staff of a psychiatric facility should have the responsibility to bring to the attention of the Superintendent of the facility or other medical officer in charge of the psychiatric facility in question every request for discharge which he or she receives from a voluntary patient.
 10. A person should only be admitted to a psychiatric facility as a compulsory patient, or alternatively his admission should be extended only where, following separate psychiatric assessments by them, two psychiatrists duly qualified to practise in the province, independently issue their certificates of admission or renewal, as the case may be. Psychiatrists should be required to certify that in their opinion the person is suffering from mental disorder of a nature that likely will result in serious bodily harm to the person; serious bodily harm to another person; or imminent and serious physical impairment to the person unless that person remains in the custody of the hospital and that the person is not suitable for admission or continuation as a voluntary patient.
 11. Every admission and renewal certificate should be dated and signed by the psychiatrist who issues it. In addition, each should show the date and time that the personal examination was made and the facts upon which the psychiatrist formed his opinion as to the nature of the disorder, distinguishing the facts observed by him from the facts communicated to him by others.
 12. (a) Two certificates of admission should be sufficient authority to detain a person at a psychiatric facility for a period of no more than one month.
 - (b) Certificates of renewal to extend the compulsory confinement beyond one month should be invalid unless they are issued within specified periods of time. These periods should be—

- (i) within one month from the date of the person's admission as a compulsory patient, that is, within one month from the issuance of the two certificates of admission;
 - (ii) within two months from the date of the first renewal certificates;
 - (iii) within three months from the date of the second renewal of the certificates and every renewal thereafter.
13. A compulsory patient whose authorized period of detention, either on admission or renewal, has expired, should thereupon become a voluntary patient. The patient and his/her nearest relatives should thereupon be advised of the changes in his/her status, and the patient's right to discharge upon eight hours' notice.
 14. A compulsory patient whose authorized period of detention either on admission or renewal has not expired, should nevertheless be continued as a voluntary patient where, in the opinion of the attending psychiatrist, it would be appropriate. In his case, the certificates of admission and renewal should be deemed to be cancelled and the patient and his/her nearest relative should be so advised.
 15. Upon his admission and later upon his continuation as a compulsory patient and upon every subsequent extension of his detention, a patient should have the right, on request, to have an independent assessment of himself by a psychiatrist of his own choice.
 16. (a) Upon his admission or continuation as a voluntary or as a compulsory patient, both the patient and his nearest relative should be informed in simple language of the reason for his detention. He should also be given a written statement of the authority for his detention, the period thereof, of his right to communicate with counsel and the Ombudsman, and other appropriate parties, and in the case of a compulsory patient his right to an independent psychiatric assessment by his own psychiatrist or by a psychiatrist he selects; in the case of a voluntary patient his right to request discharge. The existence of the office of the "Patients' Advocate" should also be made known to all patients at this time.
 - (b) A statement made to a compulsory patient should also include information concerning the existence and function of the Review Board(s), the name and address of the Chairman of the appropriate board, and the patient's right to apply to the Board at specified intervals for cancellation of the admission or renewal certificates then in force.
 - (c) The information concerning the patient's rights which is contained in a written statement given to him should be supplemented by posters on display in all psychiatric facilities in the province. The posters should also advertise the existence and availability of Legal Aid, the Ombudsman and the office of the Patients' Advocate.
 17. (a) A Patients' Advocate should be available in all psychiatric facilities to intercede in matters concerning the rights of

- mental health patients, such advocates could possibly be established through the office of the Public Trustee.
- (b) Where a person is admitted or continued as a voluntary patient or admitted or continued as a compulsory patient in a psychiatric facility the medical director or other officer in charge should be required to forward a notice in writing of that fact to the office of the Patients' Advocate.
 - (c) Where there is a conflict of opinion as between the psychiatrist at a hospital and a psychiatrist selected by a patient to conduct an independent psychiatric assessment of him, the medical director or other officer in charge of the facility should forward a notice to that effect to the office of the Patients' Advocate.
 - (d) A notice to the office of the Patients' Advocate should contain information advising the advocate of the presence of the patient at the facility, the date of his arrival, the date of his admission, his status in the facility, as well as other information needed to facilitate the bringing by the patient, or the advocate on his behalf, of an application for review, a notice for discharge and a request for independent psychiatric assessment.
18. (a) The province should establish a Mental Health Review Board for the purpose of hearing and considering applications from compulsory patients for the cancellation of admission or renewal certificates.
- (b) In addition the Mental Health Review Board should automatically, at least once a year, review the case of every compulsory and every voluntary patient who has been in a psychiatric facility for a year or more.
 - (c) The Mental Health Review Board should consist of one or more three member panels, the members of which should be appointed by the Minister of Health and Social Development for the province and should include at least one psychiatrist and at least one barrister or solicitor.
19. The Commission is unable to present a majority recommendation on the issue of membership on review panels. We therefore suggest one of the following be adopted—
- 19A. (a) No person who is serving as a member of the staff of a facility should be eligible to sit as a member or alternate member of the review panel when the panel is considering the case of a patient of that facility.
- (b) No member of the Review Board should sit on a panel when the panel is considering the review of a patient or former patient, client or former client or relative of a member of the review panel in question.

OR:

- 19B. (a) No person who is actively serving as a member of the staff of a facility should be eligible to sit as a member or alternate member of a review panel when the panel is considering the case of a patient of that facility.
- (b) No member of the Review Board should sit on a panel when

the panel is considering the review of a patient or former patient, client or former client or relative of a member of the review panel in question.

- (c) Members of a barrister and solicitor or a psychiatrist's family should also be excluded from sitting on a panel when the panel is considering the review of a patient or former patient, client or former client of the barrister and solicitor or psychiatrist in question.

OR:

- 19C. (a) No person should be eligible to sit as a member or alternate member of a review panel when the panel is considering the review of a patient with whom he or she is acquainted.
- 20. (a) A compulsory patient or a person on his behalf should have the right to apply to the chairman of the Mental Health Review Board for cancellation of the admission or renewal certificates under which authority he is detained, but he should be permitted to make no more than one application with respect to the initial admission and to each subsequent renewal.
 - (b) Within 28 days of the receipt of an application by the chairman or such longer period as the Minister allows, the review panel appointed to hear the review should hear and consider the application.
 - (c) The panel which hears the review should be required to reach its decision within 14 days after completing the hearing.
 - (d) Within seven days of the date of its decision, copies of the decision of the review panel, including in the case of an adverse ruling, a notice regarding the right to appeal the decision, should be sent to the applicant, his nearest relative, and the office of the Patients' Advocate as well as to any other person interested in or present at the hearing.
 - (e) A decision of the Mental Health Review Board should be binding upon the board of the facility.
 - (f) An appeal *de novo* from the decision of the Mental Health Review Board should be to the County Court as of right. Notice of appeal should be given within 28 days of the decision and may be given by the patient or someone on his behalf or by the medical superintendent or director of the facility.
- 21. (a) The hearings of the Mental Health Review Board should be in camera.
 - (b) The patient and/or his counsel or someone on his behalf, his family, and a representative of the facility should however have the right to be personally present at the hearing.
 - (c) Any other person should be admitted to the hearing only with the prior consent of the panel.
- 22. (a) The patient or his representative should receive a summary of the contents of the medical records and of the reasons for his continued detention within a reasonable time in advance of the hearing of a review panel.
 - (b) In addition to the provision of a summary, a patient's legal

counsel or other representative should have access within a reasonable time in advance of the hearing, to all of the patient's medical history and records at the facility.

- (c) All the patient's medical history and records relating to his admission and detention at the facility should be provided to the Mental Health Review Board within a reasonable time in advance of the hearing.
- 23. Notice of the date of a hearing should be given to the patient, his nearest relative, counsel and the Patients' Advocate within a reasonable time in advance of a hearing.
- 24. A patient should have reasonable opportunity to present evidence at the hearing.
- 25. The Commission is unable to present a majority recommendation on the issue of free communication. We therefore suggest one of the following alternatives be adopted—
- 25A. A patient in a psychiatric facility should have an unrestricted right to communicate in writing and no communication which is written by a patient or sent to a patient should be opened, examined, withheld or delayed.

OR:

- 25B. (a) Communications written by or to a patient in a psychiatric facility by or to—
 - (i) a barrister or solicitor;
 - (ii) a member of the Mental Health Review Board;
 - (iii) a member of the Legislative Assembly;
 - (iv) a member of the Parliament of Canada;
 - (v) the Ombudsman;
 - (vi) the Patients' Advocate;
 - (vii) the Public Trustee; or
 - (viii) a psychiatrist duly qualified to practise in Manitoba, should not be opened, examined, censored, withheld or delayed.
 - (b) Any other communication written by or to a patient should be subject to be opened, examined, censored, withheld or delayed only where the officer in charge of a psychiatric facility or other person acting on his instructions has reasonable grounds to believe that the contents would
 - (i) be unreasonably harmful or offensive to the addressee;
 - (ii) prejudice the best interests of the patient;
 - (iii) interfere with the treatment of the patient; or
 - (iv) cause the patient unnecessary distress.
 - (c) Where the officer in charge of a psychiatric facility censors or withholds the delivery of a communication either from the patient or to the addressee, a copy of the original communication should thereupon immediately be delivered to the office of the Patients' Advocate whose responsibility it should be to determine the question of delivery.
 - (d) Where a communication is not released to the patient or forwarded to the addressee as a result of the order of the Patients' Advocate, it should be returned to the sender.
- 26. (a) A patient who is in a psychiatric facility on a voluntary basis

- should be permitted to vote in provincial and municipal elections.
- (b) A patient who is in a psychiatric facility on a compulsory basis should not be permitted to vote in provincial and municipal elections.
27. All controversial, experimental or surgical psychiatric procedures should be subject to independent review before they are permitted whether or not the patient is voluntary or compulsory and whether or not he appears to give his consent.
28. The Commission is unable to present a majority recommendation on what form independent review should take. We therefore suggest one of the following alternatives be adopted—
- 28A. Any treatment of a controversial, experimental or surgical nature should be subject to review by a court before it may be performed.
- OR:*
- 28B. Any treatment of a controversial, experimental or surgical nature should be subject to review by the Mental Health Review Board before it may be performed.
29. (a) Where a compulsory patient objects to drastic treatment other than treatment of a controversial, experimental or surgical nature, the treatment in question should not be performed unless it is recommended following independent assessment by a psychiatrist selected or approved by the patient or his representative.
- (b) Where the psychiatrist who conducts the independent assessment does not recommend the treatment, the attending psychiatrist who proposed the treatment should forward a notice of these facts to the Mental Health Review Board for a hearing.
30. A person who is a voluntary patient in a psychiatric facility should have the absolute right to consent or refuse to consent to treatment of any kind.

Canada – Saskatchewan

Health care and the consent of minors

The Law Reform Commission of Saskatchewan has published a paper entitled “Tentative Proposals for a Consent of Minors to Health Care Act”. The proposals were prepared by the research staff of the Commission and have been tentatively adopted by the Commissioners. Comment and criticism is invited.

The paper discusses the present law in the Province and reviews relevant legislation in England, British Columbia, Ontario and Québec. It also comments upon proposals for reform made by the Alberta Institute of Law Reform and Research, and upon the Medical Consent of Minors Act adopted and recommended by the Uniform Law Conference of Canada. It is noted that a statute in that form has been enacted, with one minor departure, only in New Brunswick.

A draft Bill, which would reflect the Commission's tentative proposals is included in the paper. The Commission explains its approach in the following manner –

- (i) teenagers today have adopted a lifestyle involving travel, living away from home and generally enjoying more freedom than their counterparts of earlier generations might have wished for or could have imagined. At the same time, the notion of parental authority has been undergoing change;
- (ii) the age of 16 is not without legislative foundation in the Province. The Family Services Act 1973 sets 16 years as the age limit for neglected children. As well, 16 year olds can legally leave school, validly drive an automobile, and receive social assistance as an adult. It would, therefore, appear reasonable that teenagers 16 years of age and older should be capable at law of consenting to their own health care;
- (iii) while it is hoped that physicians, if asked to provide health care for a patient under the age of 16, would seek the patient's permission to consult with his or her parents, it must be recognised that there will be situations where patients below the age of 16 years will be unwilling, or unable, to obtain parental consent. In such cases, the continuing health and well-being of the patient under the age of 16 should be paramount. If the physician in consultation with another physician is of the opinion that the under 16 year old is mature enough to understand the nature and consequences of the health care to be provided, then parental consent should not be necessary, unless a court decrees otherwise. In those cases where the under 16 year old is not sufficiently mature, then parental consent must be sought or a court order obtained dispensing with such consent;
- (iv) in recommending the enactment of the Consent of Minors to Health Care Act in the form proposed, an attempt has been made to provide legislation that clarifies the law, recognises that all minor children have a right to adequate health care and guarantees older minors a right of privacy.

Consent of minors to health care

The Law Reform Commission of Saskatchewan has published a Report under the title "Proposals for a Consent of Minors to Health Care Act". The Commission's 1978 working paper on the subject was noted at (1979) 5 C.L.B. 466.

The Commission explains that their original intention in proposing a statute was to fix the age 16 years as the age at which persons could consent to their own health care. After further consideration and taking into account the public response to their tentative proposals, the Commission decided against recommending either a fixed age for

a minor's consent or the necessity of a second opinion as to a minor's capacity. Instead the Commission has, in redrafting the proposed statute, condoned existing common law. However, since the Commission remained of the opinion that in matters of a minor's health care the paramount consideration is the welfare of the minor, the Report proposes a procedure for the judicial determination of a minor's capacity to consent to health care. The Commission points out that the recommendation for widening the ambit of ex parte orders for the purpose of the Act to allow a mature minor to consent to his or her own health care without parental notification may be an extension of the present law.

Under the Commission's draft Act it is declared that—

- (i) a minor who has the capacity to understand and appreciate the nature and consequences of health care proposed to be provided to him or her may consent to that health care;
- (ii) any minor who is capable of consenting to his or her own health care is capable of consenting to health care for any minor child in his or her custody;
- (iii) no consent is required for health care for any minor where it is necessary in an emergency to meet an imminent risk to the minor's life or health.

There would be provision for ex parte applications to the court (with no right of appeal against the decisions given) by "a person with sufficient interest" for any of the following orders—

- (a) to declare that a minor has the capacity to understand and appreciate the nature and consequences of health care proposed to be provided to him or her; or
- (b) dispensing with the required consent; or
- (c) prohibiting the health care where that person has reasonable grounds to believe that the minor lacks the capacity to understand and appreciate the nature and consequences of that health care.

The draft Act also sets out the matters to which the judge shall have regard in considering an application.

Definition of death

The Law Reform Commission of Saskatchewan has published a report entitled "Tentative Proposals for a Definition of Death Act". The essential question addressed in the Report is whether the law should adhere to the traditional approach and focus entirely on cardiac and respiratory functions as the only acceptable evidence of death, or whether it should focus more attention on the brain in determining what constitutes death.

It is postulated in the preface that if the traditional approach is retained, a person whose heart and lungs are kept operating through

artificial means would be deemed to be alive, even though his brain function has ceased, whereas if the test of death focuses on the brain itself, then the fact that heart and lung functions are artificially maintained is irrelevant if other reliable evidence is available which establishes that the brain has ceased to function. The Commission acknowledges that the underlying issue has philosophical, moral, religious, medical and social ramifications, all of which it did not feel competent to explore.

The Commission nevertheless considers the state of the law and some of the many interesting questions raised by the need to determine the time of death, for example, how the time of death affects the question of availability of organs for transplantation.

The Commission notes that until recently death was defined in traditional common law terms of a total stoppage of such vital functions as respiration and circulation of the blood, a definition which has been rendered unsuitable by modern medical technology and so recognised in a number of recent decisions. There have been cases involving what has been described as "corpse ventilation" or "brain death" concept. The brain death concept was considered recently in *R v. Kitching and Adams* [1976] 6 W.W.R. 697 in which the accused were convicted for the manslaughter of a person kept alive by the help of a respirator. There was no dispute that the accused had caused the severe and irreversible brain injury that resulted in the "death of the brain" of the deceased.

The Report cites a number of decided cases to illustrate the uncertain state of the common law as regards death and suggests that there should be a statutory definition, which is still wanting. It notes that although "death" has been defined by legislation in a number of jurisdictions in the U.S.A. and in Manitoba, such was not the case in Saskatchewan. Although there are numerous examples of Acts in which the question arises as to the time of death, in none of these is the definition of death given. The Report notes that "Problems could easily arise where a person who has given the necessary consent has suffered brain death but is being mechanically ventilated by means of a respirator. Can the doctors remove the needed organs on the basis of brain death definition, or must they wait until cardiac arrest has occurred, at which point the organs will begin to deteriorate"?

The Report also considers the state of medicine, in which it notes that there seems to be general acceptance of the concept of brain death among the medical community, although there are disagreements as to the criteria to be employed in determining whether such death has occurred. However, it states four criteria for the definition of death, proposed by the Canadian Medical Association which the Association adapted from the Harvard criteria for the definition of brain death first proposed in 1968 by the Ad Hoc Committee of the Harvard Medical School,—

- (a) unreceptivity and unresponsivity of the patient: total unawareness of externally applied stimuli and inner need and complete unresponsiveness;
- (b) no movements or breathing: physicians must observe the patient for at least one hour to satisfy criteria of no spontaneous muscular movements or spontaneous respiration or response to stimuli such as pain, touch, sound or light: "When the patient is on a mechanical respirator, the total absence of spontaneous breathing may be established by turning off the respirator for three minutes and observing whether there is any effort on the part of the subject to breathe spontaneously";
- (c) no reflexes: pupil fixed and dilated: will not respond to a direct source of bright light. Ocular movement and blinking are absent. No evidence of postular activity. Swallowing, yawning, and vocalisation are absent. Corneal and pharyngeal reflexes are absent;
- (d) electro-cerebral silence: flat EEG of great confirmatory value.

The Association further states that—

If transplantation of an organ is involved, the decision that death exists should be made by two or more physicians and the physicians determining the moment of death should in no way be immediately concerned with the performance of the transplantation.

The Report notes that in the United Kingdom criteria for the definition of brain death had been considered by the Conference of Royal Colleges and Faculties of the United Kingdom with similar results. However, this Anglo-American approach to the definition of brain death is not subscribed to by the Austro-German School who criticise it as being inadequate on the ground that "death is not a certainty until the impossibility of brain function has been proved."

Disagreement is also recorded between those who support the definition of death as death of the neocortex alone, i.e., death of that part of the brain which controls the higher brain functions of thought, and whole brain death.

It was, the Report notes, this general lack of agreement in the medical community concerning the criteria for the determination of brain death that prompted the question whether, if a definition of death were to be legislated, the criteria should also be set by the legislature whether it should be left to the medical community. It notes that the Law Reform Commission of Canada was in favour of leaving the criteria to be determined by the medical community, and was also in favour of a definition of brain death which requires the cessation of spontaneous heartbeat but that the majority opinion which the Commission considered to be a more rational approach was in favour of a definition which did not require cessation of heartbeat.

The Report examines a select number of alternative definitions of

death some of which, e.g. the Manitoba definition, have been enacted. These definitions are set out in an Appendix to the Report as follows—

Australia—

- (1) A person has died when there has occurred:
 - (a) irreversible cessation to all functions of the brain of the person;
or
 - (b) irreversible cessation of circulation of blood in the body of the person.
- (2) (a) Where the respiration and the circulation of the blood of a person are being maintained by artificial means, tissue shall not be removed from the body of the person for the purpose of the transplantation of the tissue to the body of a living person or for use for other therapeutic purposes or for medical or scientific purposes unless two registered medical practitioners (each of whom has carried out a clinical examination of the person, each of whom has been, for a period of not less than five years, a registered medical practitioner and one of whom is a specialist neurologist or neurosurgeon or has such other qualifications as are prescribed) have declared that irreversible cessation of all function of the brain of the person has occurred.
- (b) For the purposes of sub-section (a), any period during which a person who is a medical practitioner practised as a medical practitioner, however described, under the law in force in a country outside Australia shall be taken into account in calculating the period of five years referred to in that sub-section.

(Australian Law Reform Commission — “Report on Human Tissue Transplants.”)

California—

7180 A person shall be pronounced dead if it is determined by a physician that the person has suffered a total and irreversible cessation of brain function. There shall be independent confirmation of the death by another physician.

Nothing in this chapter shall prohibit a physician from using other usual and customary procedures for determining death as the exclusive basis for pronouncing a person dead.

7181 When a part of the donor is used for direct transplantation pursuant to the Uniform Anatomical Gift Act (Chapter 3.5 commencing with Section 7150) and the death of the donor is determined by determining that the person has suffered a total and irreversible cessation of brain function, there shall be independent confirmation of the death by another physician.

Neither the physician making the determination of death under Section 7155.5 nor the physician making the independent confirmation shall participate in the procedures for removing or transplanting a part.

(California Health and Safety Code 7180–81 (West Supp. 1975)).

Capron and Kass—

A person will be considered dead if in the announced opinion of a

physician, based on ordinary standards of medical practice, he has experienced an irreversible cessation of spontaneous respiratory and circulatory functions. In the event that artificial means of support preclude a determination that these functions have ceased, a person will be considered dead if in the announced opinion of a physician, based on ordinary standards of medical practice, he has experienced an irreversible cessation of spontaneous brain functions. Death will have occurred at the time when the relevant functions ceased.

(Capron and Kass, "A Statutory Definition of the Standards for Determining Human Death", 121 U. P.A. L. Rev. 87 (1972) (a)).

Kansas—

- (1) A person will be considered medically and legally dead if, in the opinion of a physician, based on ordinary standards of medical practice, there is the absence of spontaneous respiratory and cardiac function and, because of the disease or condition which caused, directly or indirectly, these function to cease, or because of the passage of time since these functions ceased, attempts at resuscitation are considered hopeless; and, in this event, death will have occurred at the time these functions ceased; or
- (2) A person will be considered medically and legally dead if, in the opinion of a physician, based on ordinary standards of medical practice, there is the absence of spontaneous brain function; and if based on ordinary standards of medical practice, during reasonable attempts to either maintain or restore spontaneous circulatory or respiratory function in the absence of aforesaid brain function, it appears that further attempts at resuscitation or supportive maintenance will not succeed, death will have occurred at the time when these conditions first coincide. Death is to be pronounced before artificial means of supporting respiratory and circulatory functions are terminated and before any vital organ is removed for purposes of transplantation.

(Kan. Stat. Ann. 77 – 202 (Supp. 1974)).

Law Reform Commission of Canada proposal—

A person is dead when an irreversible cessation of all that person's brain functions has occurred.

The cessation of brain functions can be determined by the prolonged absence of spontaneous cardiac and respiratory functions.

When the determination of the absence of cardiac and respiratory functions is made impossible by the use of artificial means of support, the cessation of the brain functions may be determined by any means recognized by the ordinary standards of current medical practice.

(Working Paper No. 23, 1979, Criteria for the Definition of Death.)

Manitoba—

2.1 For all purposes within the legislative competence of the Legislature of Manitoba the death of a person takes place at the time at which irreversible cessation of all that person's brain function occurs.

(The Vital Statistics Act, R.S.M. 1970, c. V60, as amended by S.M. 1975, c. 5, s. 1).

The Report acknowledges that opinion is divided as to whether there is need to legislate a definition of death but favours such

legislation for three main reasons—

- (i) it will resolve the legal and moral dilemma in which the medical profession could easily find itself;
- (ii) it will simplify the question of the time of death;
- (iii) it will enable organ transplantation to proceed unhampered by concerns as to possible liability of the physicians concerned.

The Commission made its own proposals for an enactment in the following terms—

An Act respecting the Definition of Death
HER MAJESTY, by and with the advice and consent of the Legislative Assembly of Saskatchewan, enacts as follows:

- | | |
|-------------------------------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <i>Short title</i> | 1. This Act may be cited as The Definition of Death Act, 19. |
| <i>Definition</i> | 2. Death is the total and irreversible cessation of brain function. |
| <i>Determination of Death</i> | 3. (1) Death may be determined by the irreversible cessation of spontaneous circulation and respiration or by any other means recognized by the ordinary standards of current medical practice.
(2) Where mechanical support or respiration and/or circulation is being used, the determination of death by the attending physician shall be independently confirmed by another physician. |

NOTE: In the event this legislation is enacted, the words "in accordance with accepted medical practice" where they appear in Section 8(1) of The Human Tissue Gift Act, R.S.S. 1978, c. H-15 would have to be deleted.

New Zealand

Administrative Tribunals

The Public and Administrative Law Reform Committee has presented its Ninth Report (1977) to the Minister of Justice.

The following is a summary of some of the recommendations made in the Report—

- (i) that arrangements should be made for a complaint made to a disciplinary body of a profession or occupation and rejected as trivial, misconceived, or otherwise lacking in merit to be examined by a lay representative; and that the public should be represented on the disciplinary tribunal to which an investigative body makes its report;
- (ii) that those who serve on the investigative body should be disqualified from serving on the disciplinary tribunal;
- (iii) that the procedure of the investigative body should be such as to ensure that a fair hearing is given to both the complainant

- and the person whose conduct is being investigated; and that, in general, the principles of natural justice should be observed;
- (iv) that the grounds on which registration or membership of a profession or occupation may be cancelled or suspended, or another penalty imposed, must be seen to be appropriate to the profession or occupation;
 - (v) that there should be adequate appeal rights available to both parties from decisions of disciplinary bodies.

Bodily examination of suspects

The Criminal Law Reform Committee of New Zealand has published a Report under the title "Bodily Examination and Samples as a Means of Identification". The Committee explains that during discussions on visual identification which led to the Committee's Report on Identification [noted at (1979) 5 C.L.B. 155] members had been drawn to the view that in some cases the unreliability inherent in eyewitnesses evidence might be avoided if the identification of the offender were effected by the use of forensic methods. An offender, in the course of committing his crime, sometimes left physical evidence of his bodily characteristics at the scene, e.g. a fingerprint, or strands of hair.

Alternatively, evidence might be left on the body of the offender which indicated his participation in the crime, e.g. scratch marks inflicted by his victim, or matter adhering beneath his fingernails. In both situations, however, there was the problem of obtaining the requisite samples from the offender for comparison or of examining his body. At common law and under present New Zealand statutory law no Court had power to compel this.

The Report examines and discusses the state of the law and proposals for reform in several Commonwealth jurisdictions, and in the U.S.A. and, by a majority, felt that there should be established a statutory procedure for compulsory bodily examination or taking of samples of the means of identification. Two members of the Committee dissented from the recommendations of the majority, and minority reports are annexed. Of these, one was completely opposed to the statutory procedure proposed, while the other supported it in relation to a suspect after, but not before, arrest.

The Committee recognised that the proposals involved a nice balancing of interests, particularly if the procedure were to apply to a person who has not actually been arrested and charged with an offence. As a general principle, however, it was felt that the rights of the individual were no more absolute than society's need for effective law enforcement.

The following is a summary of the Committee's recommendations—

- (i) there should be enacted a statutory procedure to enable a member of the Police of or above the rank of Sergeant to apply to a Magistrate for an order authorising the external examination of a suspect's body, or the obtaining from a suspect of a sample of his blood, saliva, hair, or nail clippings and scrapings, or his finger, palm or footprints, or his dental impressions.
- (ii) such a procedure should be available where there are reasonable grounds to believe that the suspect has committed a specific offence punishable by 12 months' imprisonment or more, and that relevant material or evidence will result from the examination or taking of the sample which will assist in determining the guilt or innocence of the person suspected of having committed that offence.
- (iii) the procedure should be available both before and after the arrest of the suspect;
- (iv) the procedure should also be available where suspicion falls on an identifiable group of people of whom one must have committed the offence;
- (v) application for an order should be made ex parte, but the suspect should have a right to object to the order on genuine medical or religious grounds, or to seek a variation of a particular term of the order, before the order is executed;
- (vi) the person executing the order should be permitted to use such reasonable force as may be necessary to overcome any physical resistance by the examinee during the examination or taking of the sample;
- (vii) there should be a further emergency procedure whereby a member of the Police of or above the rank of Sergeant may authorise the immediate taking of nail clippings or scrapings by a doctor where there is a danger that the sample may otherwise be destroyed;
- (viii) an order should remain in force for a specified duration only. In ordinary circumstances it should not remain in force for more than a week. Some discretion should be left to the Magistrate in appropriate cases to specify that the order is to be executed within some lesser time;
- (ix) there should also be provision that, where the time specified in the order has expired and the order has not yet been executed, a Magistrate may renew the order if satisfied that there are special reasons for his doing so;
- (x) as a general principle whenever a body examination involves the removal of the examinee's clothing to the extent that it may impinge upon his or her modesty and dignity, then, unless the examination is to be carried out by a doctor, the examinee should have the right, where practicable, to be examined by

someone of the same sex. Every other officer assisting the examiner should also be of the same sex as the person being examined;

- (xi) the examinee should be able to have his own lawyer, doctor, dentist or friend present during the examination if he wishes. In some cases, depending on the nature of the examination, he may wish to have more than one of such persons present, e.g. both his lawyer and a doctor. For practical reasons however some limit on numbers has to be set, and to allow the examinee a total of three persons of his choice would be fair;
- (xii) all possible effort should be made fully to advise the suspect of his right to remain silent. Not only should the Police be required to explain this orally to the suspect before any examination commences (or upon the suspect's being taken and detained for the purpose of examination following his non-appearance), but the right to remain silent should be clearly spelled out on the face of the order itself.

Inquiry into Chiropractic

The Commission of Inquiry into Chiropractic (viz. manipulation of the spinal column as a method of curing disease) has presented its report to Government. Chiropractic has been a subject of controversy within the New Zealand medical profession for a number of years. The three-person Commission had been established with terms of reference which directed it to have regard to and consider—

- (a) the practice and philosophy of chiropractic, its scientific and education basis, and whether it constitutes a separate and distinct healing art;
- (b) the contribution chiropractic could make to the health services of New Zealand;
- (c) any other matters the Commission may think relevant to the general objects of the inquiry.

In the course of its deliberations the Commission received a total of 136 formal submissions, 37 of these being from organisations and 99 from private individuals; the majority of the submissions were presented in person by the individuals or representatives of organisations concerned. People presenting submissions orally were subjected to cross examination, as were some representatives of the principal parties in respect of evidence given to the Commission.

The Commission sat in public for a total of 78 days and in closed or restricted session for 15 days. It visited two medical universities and two schools of physiotherapy, and also attended some technical demonstrations by chiropractors and physiotherapists. In addition, it travelled overseas spending 17 days meeting officers of various organisations and looking at several chiropractic colleges where New Zealand chiropractors are trained.

The report of the Commission is being considered by Government. It is an extensive document covering complex issues which have serious

implications for the future pattern of health services in New Zealand. Its formal recommendations are lengthy but, in view of the Commission's own caution that they should be considered in the context of its general conclusion and in relation to the section of the report to which each recommendation refers, no attempt has been made to summarise them. They are set out below—

Chiropractors and the general health care team

Recommendation 1

That appropriate steps be taken to ensure that chiropractors are included as partners in the general health care team, in particular—

- (a) By overhauling and strengthening the statutory provisions relating to discipline within the chiropractic profession (see recommendations 2-7, below);
- (b) By reconstituting the Chiropractic Board (see recommendations 8-9, below);
- (c) By transferring the administration of the Chiropractors Act 1960 from the Department of Justice to the Department of Health (see recommendation 10, below);
- (d) By abolishing by statute the rules of medical ethics prohibiting medical practitioners from referring patients to registered chiropractors or from collaborating with chiropractors concerning patients (see recommendation 11, below);
- (e) By enabling registered chiropractors to have access to hospitals to treat their own patients (subject to appropriate safeguards) (see recommendation 12 (1), below), and to take part in hospital programmes of physical medicine services (see recommendation 12 (2) below);
- (f) By providing health and accident compensation benefits for the patients of registered chiropractors (see recommendations 13, 14, below).

Chiropractic professional discipline

Recommendation 2

That the present system of discipline within the chiropractic profession be overhauled, and that in particular:

- (a) All disciplinary powers and disciplinary action within the chiropractic profession be regulated by the Chiropractors Act 1960, amended in accordance with these recommendations;
- (b) The New Zealand Chiropractors' Association be reincorporated as a statutory body under the Chiropractors Act 1960, that its membership, objects, and powers be defined by the Act, that it should no longer act as a disciplinary body, and that membership of it be made compulsory for all chiropractors holding a practising certificate;
- (c) The range of disciplinary offences be enlarged by statute and the penalties revised (see further, recommendations 3-6 below).

Recommended new disciplinary structure

(1) New Complaints Committee

Recommendation 3

- (a) That the present Chiropractic Disciplinary Committee (Chiropractors Act 1960, section 7) be abolished and substituted by a statutory Complaints Committee.
- (b) That the membership of the new Complaints Committee be the association's president and vice-president *ex officio*, two other persons being chiropractors holding current practising certificates, and one further member being a senior officer of the Department of Health to be nominated by the Director-General of Health.
- (c) That the quorum of the new Complaints Committee be not less than three

members, one of whom shall be the nominee of the Director-General of Health.

- (d) That the secretary of the new Complaints Committee be the secretary for the time being of the Chiropractic Board.
- (e) That the functions of the new Complaints Committee be—
 - (i) To make a preliminary investigation of any complaint against a chiropractor and to determine whether the chiropractor should be charged with a disciplinary offence before the Chiropractic Board; and
 - (ii) In relatively minor cases, to hear and determine the complaint itself.
- (f) That the new Complaints Committee, if it hears and determines the case itself, have power to impose the following penalties or make the following orders:
 - (i) The imposition of a fine not exceeding a total of \$500 in respect of all charges;
 - (ii) Suspension for not longer than three months;
 - (iii) Censure;
 - (iv) An order that the chiropractor concerned pay the costs, or part of the costs, of the investigation and hearing.

Where the penalty is suspension, the chiropractor concerned should have the right to apply to the Chiropractic Board for rescission of the suspension. In all cases the chiropractor should have a right to appeal to the board.

- (g) That in addition to the above powers, the new Complaints Committee be specifically empowered to require a chiropractor against whom a complaint has been made to furnish the committee, within a reasonable time of not less than seven days, with a written explanation; and that failure to supply such an explanation within the time required should be declared to be professional misconduct and punishable as such.

(2) Disciplinary Powers of Chiropractic Board

Recommendation 4

That the Chiropractic Board, as reconstituted (see recommendation 8, below), should have enlarged disciplinary powers, the existing statutory grounds for disciplinary action being inadequate.

Recommendation 5

That the existing statutory grounds for disciplinary action be enlarged so that the full list would read as follows:

- (a) Gross negligence or malpractice in respect of his calling;
- (b) Conviction of an indictable offence punishable by two or more years' imprisonment;
- (c) Grave impropriety or misconduct, whether in respect of his calling or not;
- (d) Use of the title "doctor" on any notice or sign or in any publicity material other than in the form of the letters "D.C." following his name;
- (e) Conduct unbecoming a member of the chiropractic profession.

As to the recommended new ground (e), it is recommended that it be spelled out by statute what "conduct unbecoming" can include. The following formula is recommended:

Without limiting the meaning of the expression "conduct unbecoming a member of the chiropractic profession", the following conduct shall be deemed to be included in that expression:

- (a) By words or conduct inducing any person to believe that a chiropractor should be consulted in the first instance in preference to a registered medical practitioner, in respect of any disease or disorder; or
- (b) By words or conduct inducing any person to believe that chiropractic treatment will necessarily cure or alleviate any organic or visceral disease or disorder; or

- (c) When consulted by a patient who he knows or ought to know is suffering from a disorder requiring medical care, failing to take reasonable steps to advise the patient to consult, or to continue consulting, a registered medical practitioner; or
- (d) Exhibits or publishes to the public any circular designed for general publication which has not been approved by the association.

Recommendation 6

That the penalties which may be imposed by the Chiropractic Board as reconstituted (see recommendation 8, below) be reframed as follows:

- (a) Removal from the register;
- (b) Suspension for such period as the board thinks fit;
- (c) A fine of not more than \$5,000 in respect of each charge;
- (d) Censure;
- (e) An order that the chiropractor concerned pay the whole or part of the costs of the investigation and hearing.

Recommendation 7

That the present right of appeal from the Chiropractic Board to the Magistrate's Court (with assessors) be abolished, and that a right of appeal from the Chiropractic Board to the Supreme Court (without assessors) be substituted.

Restructuring the Chiropractic Board

Recommendation 8

That the Chiropractic Board be reconstituted as follows:

- (a) The chairman should be a barrister of not less than seven years' standing.
- (b) There should be six other members; four to be registered chiropractors of not less than seven years' standing to be nominated by the association, one to be the Director-General of Health or his nominee, being a senior officer of his department, and one to be a registered medical practitioner nominated by the New Zealand Medical Council (or, failing nomination by the New Zealand Medical Council, the Director-General of Health) (see chapter 14).

Recommendation 9

That the quorum of the reconstituted Chiropractic Board be four members, not three as at present (Chiropractors Act 1960, section 4(2)), at least one of whom, aside from the chairman, should be a non-chiropractic member (see generally chapter 43).

Administration of Chiropractors Act .

Recommendation 10

That the Chiropractors Act 1960 be brought under the administration of the Minister of Health and the Department of Health (see chapter 14).

Abolition of Rules of Medical Ethics Relating to Chiropractors

Recommendation 11

That the rules of medical ethics prohibiting medical practitioners in New Zealand from referring patients to registered chiropractors or from collaborating with chiropractors concerning patients be abolished, and accordingly that the Medical Practitioners Act 1968 be amended by inserting the following provision:

“Notwithstanding any rule to the contrary, it shall be lawful and ethical for any medical practitioner—(a) to refer a patient to a registered chiropractor for treatment provided the medical practitioner retains overall responsibility for the patient and first personally satisfies himself that the chiropractor concerned is capable of safely carrying out such treatment; and—(b) to collaborate and associate with a registered chiropractor concerning the diagnosis or management of a patient's disorder.”

Access to Hospitals by Chiropractors

Recommendation 12

(1)—

(a) That hospital authorities allow chiropractors to have access to their hospitals to give chiropractic treatment to patients who request it unless the supervising physician or surgeon withholds his approval on the ground that there are precise and specific contra-indications.

(b) That, if necessary, the Hospitals Act 1957 be amended to put the above recommendation into effect.

(2) That the participation by chiropractors in hospital physical medicine services should be positively encouraged in the public interest.

Health and Accident Compensation Benefits for Chiropractic Treatment

Recommendation 13

That, subject to the following limitations, *and subject to recommendation 14 below*, there be benefits payable under the Social Security Act 1964, and payments under the Accident Compensation Act, for chiropractic services:

(1) Chiropractic Benefits under the Social Security Act

(a) Subject to the limitations stated below, the chiropractic benefits should be equivalent to the general medical services benefits.

(b) (i) No benefit should be paid for any chiropractic treatment administered after 21 days from the date of the first consultation unless treatment for a period of more than 21 days is shown to be justified.

(ii) In no case should the total amount of chiropractic benefit (excluding a radiological benefit: see para. (c) below) paid in respect of any one patient in any one period of 12 months exceed the amounts stated in the table below, unless treatment involving payment in excess of any such amount is shown to be justified.

Maximum

	\$
Ordinary patients	25
Special group patients (including children and young persons)	80

The above maxima are inclusive of the benefit payment of \$0.75 payable for each 15 minutes in excess of 30 minutes, but exclusive of the radiology benefit.

(c) Subject to recommendation 14(3), below, a radiological benefit should be paid in respect of chiropractic X-rays in addition to the general chiropractic benefit. The radiological benefit should however be confined strictly to the diagnostic process on initial consultation and should be limited to three plates at \$5 per plate, thus providing for a maximum radiology benefit of \$15 per patient.

(d) Part II of the Social Security Act should be amended accordingly.

(2) Payment for Chiropractic Treatment under the Accident Compensation Act

(a) That accident compensation benefits be made available for the cost of treatment by a registered chiropractor (subject to the limitations stated below) without medical referral.

(b) That the Accident Compensation Act 1972 be amended accordingly, and that in particular section 111 be amended as follows:

(i) In subsection (1), by inserting in line 5 after the word "medical" the words "or chiropractor's"

(ii) In subsection (2), by inserting after subparagraph (c) the following subparagraph: "(ca) Treatment of the person by a registered chiropractor"

(iii) In subsection (5), by inserting in line 3, after the words "medical practitioner", the words "or a registered chiropractor".

- (iv) In subsection (8), by inserting in line 13, after the word “radiological”, the word “chiropractic”.
- (c) That total payments in any one year in respect of a patient’s chiropractic treatment (including X-ray costs, but subject to recommendation 14(3), below) should be limited to \$200.
- (d) That the total period of chiropractic treatment in respect of which benefits are payable should be limited to 21 days from the date of the first consultation.
- (e) The limits stated in subclauses (c) and (d) should be waived in any case where chiropractic treatment beyond the financial or time limits is shown to be justified.
- (f)
 - (i) That chiropractors be expressly included as part of the Accident Compensation Commission’s rehabilitation programme (Accident Compensation Act 1972, sections 48-53).
 - (ii) That the Act be amended accordingly by—
 - (i) Deleting in section 49(1)(a), the words “professions of medicine and dentistry” and substituting “professions of medicine, dentistry, and chiropractic”; and
 - (ii) Deleting, in section 52, the words “professions of medicine and dentistry” and substituting “professions of medicine, dentistry, and chiropractic”.

Recommendation 14

(1) Limitations on Chiropractic Treatment Under Both Acts

(a) That the cost of treatment by a registered chiropractor or a chiropractic benefit, unless the treatment has been administered on referral from a registered medical practitioner, shall be payable only in respect of treatment aimed at the relief of specific musculo-skeletal symptoms, such as back pain, which are generally accepted as having their origin in biomechanical dysfunction of the vertebral column, pelvis, and the extremities, and their associated soft tissues. Without limiting the symptoms so described, such symptoms shall include migraine (both common and classical), other forms of headache, and all cases of referred pain which can reasonably be attributed to biomechanical dysfunction, but shall not include symptoms indicating organic or visceral disorder. Payment under either Act should not be made unless the treatment in respect of which payment is claimed is justified by—

- (i) Specific identification of the symptoms at the relief of which the treatment is aimed; and
- (ii) Specific identification of the biomechanical dysfunction diagnosed as giving rise to the symptoms;

and unless the chiropractor has certified his assessment of how many treatments are likely to be required and over what period of time.

(b) Payment under either Act may be made in any case not coming within the terms of para. (1)(a) of this recommendation where the treatment is given on medical referral.

(2) Collection of Benefits

Chiropractic benefits under either Act should be claimed and collected by the chiropractor direct from the Department of Health or the Accident Compensation Commission. Where a benefit or payment is claimed, the chiropractor should be entitled to recover from his patient only the amount of his fee not covered by those benefits.

(3) Conditions for Payment of Radiology Benefits (Medical and Chiropractic)

(a) That radiology fees or the radiology benefit be paid direct to the medical practitioner or chiropractor concerned.

- (b) That the patient is to be liable only for that part of the radiologist's or chiropractor's fee not recoverable under the Social Security or Accident Compensation Acts.
- (c) That before being eligible to receive payment of a radiology fee or benefit under either Act each medical practitioner and chiropractor should be required to undertake in writing to the Department of Health or the Accident Compensation Commission that he will, if called upon to do so, furnish a patient's radiographs to that patient's chiropractor or medical practitioner (as the case may be) for examination.

Chiropractic and Physiotherapy

Recommendation 15

(1) Use by Chiropractors of Physiotherapy Aids

That chiropractors should not be encouraged to use physiotherapy aids such as heat, light, water, etc., but should instead be encouraged to refer patients requiring such aids to a registered physiotherapist; but a chiropractor properly trained in the use of physiotherapy aids should not be prevented from using them. In particular the Physiotherapy Amendment Act 1953, section 3 (relating to the use of ultra-sound equipment) should be amended so as to include chiropractors who are able to provide satisfactory evidence of training in the use of ultra-sound equipment.

(2) Training of Physiotherapists in Spinal Manual Therapy

That the responsibility for spinal manual therapy training, because of its specialised nature, should in the future lie with the chiropractic profession; that part-time or vacation training for other health professionals in spinal manual therapy with a view to such other health professionals practising spinal manual therapy should not be encouraged; but that closer general co-operation between chiropractors and physiotherapists be encouraged.

(3) That any proposed Government funding for spinal manual therapy education and training be allocated, not to weekend or vacation courses for health professionals other than chiropractors, but to bursary assistance to enable prospective chiropractors and other health professionals to attend the Preston Institute in Melbourne (and see recommendation 16, below).

Chiropractic Education and Research

(1) Education

Recommendation 16

(1) That the New Zealand Chiropractic Board encourage New Zealand students to obtain their chiropractic education at the International College of Chiropractic at the Preston Institute of Technology, Melbourne.

(2) In recognition of the fact that no Government subsidised training is available in New Zealand, that a system of bursaries should be established, to be administered by the Department of Health or the Department of Education, to provide support for New Zealand chiropractic students at the Preston Institute. (The analogy is with the former veterinary bursary scheme operated at a time when veterinary training was not offered in New Zealand.) Such chiropractic bursaries should be tenable only at the Preston Institute. (This recommendation is conditional upon full accreditation of the proposed B.App.Sc. (Chiropractic) degree by the Victorian Institute of Colleges and subsequently by the Australian Tertiary Education Commission.)

(2) Research in New Zealand

Recommendation 17

(1) That the New Zealand Chiropractors' Association formulate a proposal for a clinical trial or trials on some aspect of chiropractic treatment to be conducted in co-operation with one of the clinical medical schools in

New Zealand. This proposal should be submitted to the Medical Research Council. If the Council is not prepared to support such a trial, our recommendation is that a special grant of \$200,000 over a four-year period be made by the Department of health for this purpose.

(2) That the New Zealand Chiropractors' Association sponsor a post-doctoral research fellow to work in a New Zealand university on a topic related to fundamental chiropractic theory. The staff of the Otago University Medical School should be consulted in the formulation of such a topic. The funds required would be approximately \$15,000 per annum.

Limitation on the use by Chiropractors of the title "Doctor"

Recommendation 18

That chiropractors who are not registered medical practitioners be restricted in their use of the title "Doctor", and that some usages of the title by them be made illegal as well as providing grounds for disciplinary action (as to disciplinary action, see above, recommendation 5); and that the Chiropractors Act 1960 be amended accordingly by inserting the following provision:

"Any chiropractor who displays or causes to be displayed, or produces or causes to be produced for display or circulation, to the public any sign, notice, letterhead, professional card, advertisement, or other written or printed material which contains, in relation to any chiropractor who is not a registered medical practitioner any of the terms "Dr", "Doctor", or "Doctor of Chiropractic", commits an offence: Provided however that nothing in this section shall be read as prohibiting a chiropractor from displaying in his professional rooms any diploma or certificate relating to himself or to any other chiropractor with whose practice he is associated, or from using after his name letters denoting an academic or professional qualification."

Alternative Recommendation

(The Commission makes the following alternative recommendation on the ground that it might be thought unjust to single chiropractors out when others in the health field, not being registered medical practitioners, use the title "Doctor": see chapter 42, para. 21.)

That the Medical Practitioners Act 1969 be amended so as to make it an offence for any person who is not a registered medical practitioner to display or cause to be displayed, or produce or cause to be produced for display or circulation, to the public any sign, notice, letterhead, professional card, advertisement, or other written or printed material, in which the terms "Dr" or "Doctor" are used in such a way as to lead members of the public to believe that such person is a registered medical practitioner.

Miscellaneous

(1) Amendment to Chiropractors Act: scope of practice

Recommendation 19

That the Chiropractors Act 1960, section 2, be amended by deleting the definition of "chiropractic" and substituting the following definition—

" 'Chiropractic' means the examination and treatment by hand of the joints of the human spinal column, pelvis, and extremities, including associated soft tissues".

(2) Amendments to the Social Security Act 1964

Recommendation 20

(1) Invalids' Benefits

That section 44 be amended by adding after the words "medical practitioner" the words "or, in respect of any condition within the ambit of his profession, a registered chiropractor".

(2) Sickness Benefits

That section 56 be amended by adding after the words "registered dentist", the words "or a registered chiropractor".

(3) Amendments to War Pensions Regulations (S.R. 1956/7)

Recommendation 21

That regulation 34 be amended so that an ex-serviceman may apply for free medical, surgical, or chiropractic treatment; and that regulation 35 be amended by deleting the words "any medical practitioner to whom the service patient has applied for medical treatment" and substituting "any medical practitioner or registered chiropractor to whom the service patient has applied for medical or chiropractic treatment as the case may be".

Papua New Guinea

Sorcery

The Law Reform Commission of Papua New Guinea has published Occasional Paper No. 4, "Sorcery". The Commission had been invited to examine the types of sorcery practised in the country, determine how wide was its practice and put forward proposals for the improvement of the existing law on the subject.

In the Paper, the Commission recognises that the practice of sorcery, in different forms and under different names, is a world-wide phenomenon. The widespread practice of sorcery in Papua New Guinea caused much fear, fighting, quarrels and killings. Apart from the statutory and customary law applicable to sorcery, a form of "peoples law" had developed. The traditional legal system provided agreed compensation as the main remedy for injury or death caused by sorcery but occasionally more drastic measures might be taken against an alleged sorcerer resulting in his being unlawfully killed.

The Paper discusses the existing statutory provisions and points out that the Sorcery Act 1971 (applied by the Local, District and National Courts) follows customary law by making a distinction between "good or innocent" and "bad or evil" sorcery. Offences and maximum penalties are listed. Other offences, triable by the Village courts, are created by part of the Village Courts Regulations made under the Village Courts Act 1973. These Courts also have jurisdiction to hear and adjudicate upon claims for compensation arising out of acts of sorcery.

The Commission indicates that it intends to visit different places to consult the public, and the Paper contains a number of questions to which answers are invited. The questions fall under the following headings: the nature of sorcery; reasons for sorcery; social effects of sorcery; ways of stopping sorcery; sorcery law and sorcery and healing.

Summary trial of indictable offences

The Law Reform Commission of Papua New Guinea has published Report No. 8 on "Indictable Offences Triable Summarily." The Commission notes the concern expressed for some time that the National Court is burdened by less serious criminal offences which could well be dealt with by senior magistrates resulting in the reduction of delays.

The Commission recommends that a number of offences now triable only on indictment should be brought within the jurisdiction of the District Court when presided over by senior magistrates. The Report includes a draft Bill which would give effect to the Commission's recommendations, the principal features of which are summarised below—

- (i) although the National Court would retain a concurrent jurisdiction, the procedures were so arranged that the indictable offences triable summarily would be heard by the District Court except in cases where a lesser offence is joined with a more serious offence triable on indictment in the National Court. In these cases both charges would be heard in the National Court;
- (ii) the present power of the National Court to stay proceedings in the District Court and have them transferred to the National Court would be retained but the District Court would not be able to transfer criminal proceedings for hearing in the National Court;
- (iii) the specific offences in the Criminal Code which would be triable summarily in the District Court are itemised in the Schedule to the draft Bill, and divide into the following categories—
 - (a) offences relating to letters, telegrams etc.
 - (b) indecent dealings and assaults on women and girls
 - (c) pornography and gambling offences
 - (d) assaults up to and including assaults occasioning bodily harm
 - (e) stealing money or other things
 - (f) breaking and entering offences
 - (g) lesser forms of arson
 - (h) health and quarantine offences
 - (i) miscellaneous offences such as unlawful assembly, unlawfully using a motor vehicle and dangerous driving causing death
 - (j) attempts, and conspiracy to commit, those offences, and accessories in respect of such offences.

The Commission notes that the Papua New Guinea Criminal Code is based on the Queensland Criminal Code which, although considerably amended, is basically the same as when it was first enacted in 1899. With the passage of time, changes in social attitudes and the difference in life style and cultural development, what may have been

relevant in Queensland at the turn of the century may be inappropriate in Papua New Guinea today. The Commission believes that there is a need for an overall review of the Criminal Code having regard to the needs of the country and the orderly conduct of society, and this is being undertaken by the Commission. However, because the Criminal Code is the present law, the selection of offences to be heard summarily might reveal some anomalies. Some of the offences selected might appear very serious, or conversely, of so little importance as not to merit consideration. But the structure of the Criminal Code itself posed some limitations and until the review of the Criminal Code was completed, difficulties would remain.

Sorcery

The Law Reform Commission of Papua New Guinea has published Occasional Paper No. 10 "Sorcery Among the East Sepiks", prepared by the former Chairman of the Commission, Mr. Bernard Narokobi. The study covers an administrative unit comprising many villages. The author points out that sorcery, like many mystical beliefs, consists of an inner source of power and influence, which a sorcerer then uses to do good or evil either for his own benefit or for the benefit of others; in the latter case performing it for a fee. The dynamics of sorcery are complex, simply because they begin from a realm of mystery and end in mystery.

The Paper contains the following recommendations for law reform—

- (i) all forms of evil sorcery should continue to be outlawed;
- (ii) a minimum penalty of 5 years' imprisonment with hard labour should be introduced for proven sorcery cases;
- (iii) Village Courts should continue to have the power to determine the guilt or innocence of suspected sorcerers;
- (iv) wherever the Local, District or National Courts sit on sorcery cases, Village Court Magistrates should sit as assessors. Their determination on facts should not be disturbed by the courts;
- (v) banishment from the village should be available as an alternative to imprisonment upon conviction. Banishment could be for a specified period or for life. That decision should be taken by the village or community through a secret ballot conducted by a representative of the provincial or national government;
- (vi) those who kill known sorcerers should have available to them the defence of provocation as under the present Sorcery Act. But provocation should be redefined to be wider than the common law definition of provocation;

- (vii) those practising good sorcery should be certificated to practise herbal and traditional healing. A registry of herbal medicines and good sorcery should be established in the Health Department;
- (viii) courts should undertake inquisitions to prove evidence, subject to certain safeguards. Detection through divination should be available, but no person should be convicted on this evidence alone, without corroboration;
- (ix) a period of amnesty and possibly reward should be offered to those who wish to give up sorcery—after that period, any proven sorcerer should be dealt with according to the full rigour of the law;
- (x) protection should be offered to those who report sorcery—their identity should be kept secret;
- (xi) severe penalties should be imposed on persons to teach other evil sorcery, or transmit evil sorcery in any way or form.

United Kingdom

Proposals for amendment of the law on mentally ill

A consultative document has been published, prepared by an inter-departmental Committee which is expected to lead to amending legislation. The Committee had before it a number of suggestions for amendment of the Mental Health Act 1959 which have been made in the recent years by various professional and other bodies, and by individuals. These include the outcome of comprehensive reviews carried out by the Royal College of Psychiatrists and the National Association for Mental Health. The document also deals with the Butler Committee's specific recommendations for change (made in the Report of the Committee on Mentally Abnormal offenders; noted at (1975) 2 CLB 60). The document takes as its basis the need to balance the rights of the patient and the needs of the public. The Committee finds that the central parts of the Act concerning the use of compulsory powers, the rights of detained patients and the safeguards for patients and staff, are all in need of review. Among the features of the consultative document are —

- (i) a discussion of definitions of mental disorder and its sub-categories;
- (ii) the suggestion that compulsory detention should be based not on the interests of "health, safety or the protection of others" but replaced by a more narrow criterion is discussed;
- (iii) the use of ss. 25 and 29 of the Act is examined in the light of criticisms as to the extent of the use of emergency powers and

of the wide variation of their use in different parts of the country;

- (iv) it is not thought that a requirement should be introduced for a second opinion to be sought when renewing authority to detain a patient, but it is suggested that after an initial period of treatment a tighter criterion for continued detention be introduced and that renewals of detention orders be monitored;
- (v) it is suggested that, if annual reports are to be made to the Home Secretary on all "restricted" patients, the present intervals at which the Home Secretary may refer cases to Tribunals may not require to be changed. However, an automatic review for such patients after, say, four or five years might be introduced;
- (vi) tribunals are at present unduly restricted by being able to choose only between ordering the discharge of a patient and leaving him subject to detention. A number of proposals for widening their powers are discussed;
- (vii) The use of forensic psychiatrists as medical members of tribunals and the addition of a social worker as a member of a tribunal might be useful;
- (viii) the issue of consent to treatment requires to be clarified. The Butler suggestion that only treatment intended to prevent violence, save life, or prevent deterioration, should be carried out without consent, is thought to be acceptable, as is the suggestion that a second opinion should be sought when a form of treatment is proposed which is irreversible or hazardous;
- (ix) it is suggested that, in any proposal to give irreversible or hazardous treatment to a voluntary patient, the proposed panel might be asked to give a second opinion, even if the patient were able to give and had given an informed consent;
- (x) the possibility of extending the Butler Committee's recommendation that there be statutory provision for the appointment of patients' friends to all patients is discussed and reference is made to the difficulties of doing so;
- (xi) it is suggested that, if there is a need for such additional protection for the mentally disordered, patients' advisers might be appointed to advise the mentally disordered of their rights and of the formal complaint procedures. Such advisers might be employed on behalf of Community Health Councils, or voluntary organisations might be given Government assistance to enable them to provide this service;
- (xii) the Butler recommendations on remands to hospitals are discussed and are thought to be generally acceptable, although some require to be examined in the context of criminal procedures generally.

Offences against the person

The Criminal Law Revision Committee has published its Fourteenth Report on "Offences against the Person" (Cmnd. 7844: £4.50). The Committee's 1976 Working Paper on the same subject was noted at (1977) 3 C.L.B. 126.

An introduction explains that the law relating to offences against the person is to be found partly in the common law, and partly in statutes, particularly the Offences against the Person Act 1861. For the most part the Act had consolidated sections from previous statutes of varying dates, repeating in many instances their antiquated language and unnecessary distinctions. No one who had worked with the Act of 1861 would doubt that it was overdue for replacement. In place of the present catalogue of offences in the Act of 1861 the Committee had tried to group criminal acts according to a small number of important common characteristics so that the issue would be whether the acts proved fell within the mischief against which the criminal law was aimed rather than whether they related to one of a series of special relationships or circumstances. Thus, if X were charged with assaulting Y, it would not matter, as it did under the present law, whether Y was a clergyman performing divine service or a magistrate preserving a wreck. The special relationship and the circumstances were generally relevant to sentencing and not to the definition of the substantive offence.

The Committee had not attempted to produce a code of the law relating to offences against the person, but had tried to lay a foundation of law which at some later date could either be brought into a code or used to make a code. If at some future time a code were drawn up it might become necessary to produce statutory definitions for every kind of criminal act for which the law provided penalties. In the meantime, however, the majority of the Committee were of the opinion that it was unnecessary to define in detail common law offences and defences if they were readily identifiable and judges had no difficulty in explaining them to juries, and clerks to their magistrates. An example was provided by the offence of assault.

The Committee, in this Report, had made recommendations on maximum penalties on the same basis as it had done since 1959, namely the sentences which would be appropriate for the worst cases reasonably likely to occur. In respect of each proposed maximum the Committee had asked itself this question: is it really necessary to have a maximum as high as that? This question was particularly important in relation to the less serious offences which were of common occurrence. It might be in the public interest to keep locked up for so many years a man who used firearms to accomplish his ends; but it surely was neither necessary nor wise to sentence to five years' imprisonment, as the present law allowed, a man who had caused minor injury by lashing out with his fists.

The following (with references to relevant paragraphs of the Report omitted) is the Committee's summary of its recommendations—

Murder

1. It should be murder:
 - (a) if a person, with intent to kill, causes death and
 - (b) if a person causes death by an unlawful act intended to cause serious injury and known to him to involve a risk of causing death.In addition, if Parliament favours a provision of the type referred to in paragraphs 27 and 30, it should be on the following lines: that it should be murder if a person causes death by an unlawful act intended to cause fear (of death or serious injury) and known to the defendant to involve a risk of causing death.
2. For killing to constitute murder (or manslaughter or infanticide) the victim should have been born and have an existence independent of the mother.
3. There should be a special provision to secure that, if a jury are sure that either destruction or murder (or manslaughter or infanticide) has been committed or attempted, but are not sure which, they should convict of the lesser offence. The offence of concealing birth, contrary to section 60 of the Act of 1861, should be retained pending its examination by the appropriate departments.
4. There should not be a statutory definition of death for the purposes of offences against the person.
5. A killing should not amount to murder (or any other offence of homicide) unless death follows before the expiration of a year after the day on which the injury was inflicted. Time should run from the infliction of injury as opposed to the act which causes death.

The penalty for murder

6. We are divided on this matter. In view of the importance of the subject and the division of opinion amongst us the arguments for and against retaining the mandatory life penalty for murder have been set out in full. In the circumstances we are not in a position to recommend that there should be any change on this matter. In our consideration of other aspects of offences against the person we have assumed (unless otherwise stated) that the mandatory penalty for murder will remain.

Judicial recommendations under section 1(2) of the murder (Abolition of Death Penalty) Act 1965

7. The scheme of minimum recommendations introduced in 1965 should continue.
8. If the scheme is retained, the exercise of the power to make recommendations should continue to be discretionary. We do not agree with the Emslie Committee recommendations as far as England and Wales is concerned that judges should be required to make recommendations in every case except in exceptional circumstances. However the following changes should be made:
 - (a) an offender should be able to appeal against a minimum recommendation in the same way as against a determinate sentence;
 - (b) when making a minimum recommendation the trial judge should

- state publicly the factors on which he is basing his recommendation;
- (c) as a matter of practice, when minded to make a minimum recommendation the trial judge should invite the defence to make any representations they consider desirable.

Special defences to murder charges—provocation and diminished responsibility

9. Defences of provocation and diminished responsibility should be retained but with some changes.

10. The test of provocation should be reformulated so that provocation is a defence to a charge of murder if, on the facts as they appeared to the defendant, it can reasonably be regarded as a sufficient ground for the loss of self-control leading the defendant to react against the victim with a murderous intent.

11. The defendant should be judged with due regard to all the circumstances, including any disability, physical or mental, from which he suffered; the provocation need not be by the victim of the defendant's attack; and the defence of provocation should not depend upon the particular mode by which the victim was injured or killed. To this extent the "reasonable relationship" test should go.

12. The judge's discretion to decide whether there is any evidence on which the defence of provocation can properly be left to the jury should be restored.

13. A person who kills under provocation or while suffering from diminished responsibility should continue to be guilty of manslaughter and the offence should be punishable with a maximum penalty of life imprisonment.

14. The definition of diminished responsibility should be reworded. Some possible forms of rewording are suggested in paragraphs 92-93.

15. The burden on the defendant in respect of both provocation and diminished responsibility should only go to adducing sufficient evidence to raise an issue.

16. Provision should be made enabling a magistrates' court, if the defendant consents, to commit for manslaughter by reason of diminished responsibility or, if he has been committed for trial on a charge of murder, allowing a defendant, with his consent, to be indicted for manslaughter by reason of diminished responsibility.

17. There should be an offence of attempted manslaughter by reason of provocation or diminished responsibility.

Infanticide

18. An offence of infanticide should be retained.

19. The definition should include the following:

- (a) the woman's act or omission causes the death of her child being a child under the age of 12 months;
- (b) the act or omission is such as would otherwise amount to murder or manslaughter;
- (c) at the time of the act or omission the balance of the woman's mind was disturbed by reason of the effect of giving birth or circumstances consequent upon that birth.

20. If the defendant is charged with murder, attempted murder,

manslaughter, or attempted manslaughter, it should be possible for her to plead to, or the jury to convict of, infanticide or attempted infanticide.

21. The burden resting upon the defendant to prove infanticide should only go to adducing sufficient evidence to raise an issue.

22. The offence should be triable on indictment only and punishable with a maximum penalty of 5 years' imprisonment.

23. There should be no specific restrictions on reporting trials of infanticide.

24. There should be an offence of attempted infanticide.

Mercy killing

25. There should not be an offence of mercy killing; nor should any special sentencing discretion be given to judges in such cases.

Involuntary manslaughter

26. It should be manslaughter (punishable with a maximum penalty of life imprisonment) if a person causes death with intent to cause serious injury or being reckless whether death or serious injury be caused. All other forms of the existing offence of involuntary manslaughter, for example manslaughter by gross negligence, should be abolished.

Terrorism

27. Crimes committed either directly or indirectly for political purposes, which have come to be referred to as terrorist crimes, should not be put into a special category of crime.

Killing by consent and suicide

28. Killing by consent should continue to be treated as murder.

29. The offence now in section 4 of the Homicide Act 1957 should be restated as an offence of killing in pursuance of a suicide pact punishable with a maximum penalty of 7 years' imprisonment. It should no longer be manslaughter.

30. On an indictment charging murder, if it is established that the killing was in pursuance of a suicide pact a jury should be empowered to return that verdict. Similarly, if attempted murder is charged attempted killing in pursuance of a suicide pact should be returnable as an alternative verdict.

31. The burden resting on the defendant of proving the existence of a suicide pact should only go to adducing sufficient evidence to raise an issue.

32. Aiding, abetting, counselling or procuring suicide should continue to be an offence but should be subject to a maximum penalty of 7 years' imprisonment.

33. The consent of the Director of Public Prosecutions to the institution of proceedings for aiding, abetting, counselling or procuring suicide and killing in pursuance of a suicide pact should be necessary.

34. On an indictment charging killing in pursuance of a suicide pact a jury should be empowered to return a verdict of aiding, abetting, counselling or procuring suicide if the facts establish that offence and vice versa.

Causing death by reckless driving and causing bodily harm by wanton or furious driving

35. The offence of causing death by reckless driving should be abolished.

36. There should be a provision empowering verdicts of reckless driving and careless driving to be returned on a charge of causing death recklessly.

37. The offence of causing bodily harm by wanton or furious driving should be abolished.

38. Consideration might be given to replacing the offence of reckless driving by a driving offence involving complete disregard for the life or safety of other persons.

Grievous bodily harm, unlawful wounding and actual bodily harm

39. The existing offences under sections 18, 20 and 47 of the Act of 1861 should be repealed by the three following offences:

- (1) causing serious injury with intent to cause serious injury punishable with a maximum penalty of life imprisonment and triable on indictment only;
- (2) causing serious injury recklessly punishable with a maximum penalty of 5 years' imprisonment, and triable either way;
- (3) causing injury recklessly or with intent to cause injury punishable with a maximum penalty of 3 years' imprisonment and triable either way but made an arrestable offence.

40. We do not propose that there should be a definition of injury or serious injury except a provision that injury includes unconsciousness.

41. A magistrates' court should be empowered to convict without separate information being laid, of causing injury recklessly or with intent on a charge of causing serious injury recklessly.

Assault (including assault on a constable and sections 36-40 of the Act of 1861)

42. Assault should remain an offence and the definition should continue to be left to the common law.

43. No new offences of threatening assault or unlawful force should be created.

44. Assault should be triable summarily only and should be punishable with a maximum penalty of 6 months' imprisonment or a fine of £1,000 or both. There should be a provision empowering a jury to convict of assault on a charge of causing injury recklessly or with intent to cause injury, causing serious injury recklessly or causing serious injury with intent to cause serious injury. Similarly, a magistrates' court should be empowered to convict of assault, without separate information being laid, on a charge of causing serious injury recklessly or causing injury recklessly or with intent to cause injury.

45. Sections 42-47 of the Act of 1861 should be repealed without replacement.

46. There should continue to be an offence of assaulting a constable in the execution of his duty or a person assisting a constable in the execution of his duty.

47. In addition to having to prove that the constable assaulted was acting in the execution of his duty, the prosecution should be required to prove that the defendant knew or was reckless as to whether he was a constable.

48. The offence should remain triable summarily only with a maximum penalty of 6 months' imprisonment or a fine of £1,000 or both.

49. There should be a provision empowering magistrates' courts to convict, without separate information having to be laid, of the offence of assault on a charge of assaulting a constable or a person assisting a constable.

50. Sections 36, 37, 39 and 40 of the Act of 1861 should be repealed without replacement.

51. It should continue to be an offence for a person to assault another with intent to resist or prevent the lawful arrest of himself or any other person. The offence should be punishable with a maximum penalty of 2 years' imprisonment and triable either way.

52. There should also be a provision empowering a jury to convict of assault on a charge of assault with intent to resist or prevent a lawful arrest and similarly a magistrates' court should be empowered to convict of assault, without separate information being laid, on a charge of assault with intent to resist or prevent a lawful arrest.

Administration of poison and other noxious substances

53. Section 23 of the Act of 1861 should be repealed without replacement.

54. Section 24 of the Act of 1861 should be replaced by a provision along the following lines. It should be an offence for a person to administer to another without his consent and without lawful excuse any substance which in the circumstances is capable, and which that person knows may be capable of interfering substantially with the other's bodily functions.

55. The offence should be punishable with 3 years' imprisonment and triable either way.

Other offences under the Act of 1861 involving danger to life or bodily harm (railway offences, offences against children and sections 17, 21, 22, 26 and 31)

56. There should be a new offence on the lines of sections 32 and 33 of the Act of 1861 but extended to apply not only to railways but also to road and air traffic; the *actus reus* of the offence should be restricted in a similar way to that of sections 32 and 33, that is, to specific acts, as for example throwing obstructions onto motorways or interfering with airport safety equipment; and the offence should be committed if the defendant acts intentionally and is negligent as to causing personal injury or damage to property.

57. The offence should be punishable with a maximum penalty of 7 years' imprisonment and triable either way.

58. Section 34 of the Act of 1861 (which makes it an offence to do or omit or neglect anything so as to endanger railway passengers) should be left unrepealed.

59. Section 27 of the Act of 1861 (which relates to the abandonment of a child) should be repealed.

60. Sections 17, 21 and 22 of the Act of 1861 should be repealed without replacement.

61. The responsible government departments should give consideration to the repeal of section 26 of the Act of 1861 and section 6 of the Conspiracy and Protection of Property Act 1875.

62. Consideration should be given to modernising section 31 of the Act of 1861 and re-examining its substance. (Section 31 makes it an offence to set spring guns etc. with intent to inflict grievous bodily harm, or allow the same to remain. The provisos however allow traps to be set to destroy vermin and spring guns etc. to be set at night for the protection of dwelling-houses). What types of devices should be prohibited raises questions of public policy on which wide consultation will be necessary. Further consideration should therefore be given to these matters by the appropriate government departments.

Threats to murder or cause serious injury

63. The existing offence of threatening to murder should be extended to include threats to cause serious injury. It should remain triable either way and punishable with a maximum penalty of 10 years' imprisonment.

Solicitation to murder

64. Section 4 of the Act of 1861 should be repealed, leaving incitement to murder to be penalised at common law and punishable as it is now with a maximum penalty of life imprisonment.

False imprisonment, kidnapping and child stealing

65. The offences of false imprisonment, kidnapping, child stealing and abduction of an unmarried girl under 16 should be replaced by the following four offences;

- (a) Unlawful detention whereby it will be an offence for a person
 - (i) without lawful excuse
 - (ii) intentionally or recklessly
 - (iii) by act or omission
 - (iv) to detain another, cause him to remain where he is or cause him to accompany another person
 - (v) without the consent of the person detained (or where the consent is obtained by duress or by a deception which induces him to believe that he is under a legal compulsion).

The offence should be triable either way and punishable with a maximum penalty of 5 years' imprisonment.

The special defences available upon a charge of unlawful detention should be that the child was under the age of 14, or the defendant believed him to be under that age, and

- (i) the defendant had or believed he had lawful control over the child; or
- (ii) the defendant had or believed he had the consent of a person who had lawful control over the child or who the defendant believed had lawful control over the child.

The burden on the defendant of establishing a special defence should only go to adducing sufficient evidence to raise an issue and the defence of belief should be honest belief, not belief on reasonable grounds.

- (b) Kidnapping whereby it will be an offence for a person unlawfully to detain, etc, another as set out in (a) above, with one of the following intents:
 - (i) the intention to hold the victim to ransom or as a hostage;

- (ii) the intention to cause the victim to be sent out of the realm;
- (iii) the intention to commit an arrestable offence.

The offence should be triable on indictment only and punishable with a maximum penalty of life imprisonment.

There should be no special defences to the offence of kidnapping.

- (c) Abduction whereby it will be an offence for a person
 - (i) without lawful excuse
 - (ii) intentionally or recklessly
 - (iii) to detain or cause to remain or cause to accompany another
 - (iv) a child under 14
 - (v) so that the child is kept out of the lawful control of his parent, guardian or other person having lawful control of him without their consent.

The offence should be triable either way and be punishable with a maximum penalty of 3 years' imprisonment.

It should be made an arrestable offence.

The defences available on a charge of abduction should be:

- (i) that the defendant was the mother or father of the child (except where the intention was to cause the child to be taken out of the realm);
- (ii) that the defendant had a right, or believed he had a right, to the control of the child;
- (iii) that the person taking the child believed that the parent, guardian or any other person having lawful control of the child had consented or would have consented had he known all the circumstances;
- (iv) that the defendant believed the child to be aged 14 or over;
- (v) that the defendant believed the child not to be in the lawful control of a parent, guardian or any other person.

- (d) aggravated abduction whereby it will be an offence for a person to abduct a child under 14 as in (c) above together with one of the intents required for kidnapping in (b) above.

The offence of aggravated abduction should be triable on indictment only and punishable with life imprisonment.

There should be a special defence to the offence of aggravated abduction where the abduction is with the intention of causing the child to be taken out of the realm. In such a case it should be a defence that the defendant was the mother or father of the child abducted but he or she will remain liable to conviction for abduction.

The consent of the Director of Public Prosecutions to the institution of proceedings for any of the four recommended offences should be necessary.

Omissions

67. Save where liability for an omission is expressly imposed by statute,

- (a) liability for omissions should be restricted to the offences of murder, manslaughter, causing serious injury with intent, unlawful detention, kidnapping, abduction and aggravated abduction; and
- (b) such liability for omissions should arise only where the omission amounts to a breach of duty to act which is recognised at common law. The common law duties should not be codified.

Voluntary intoxication

68. The common law rules relating to voluntary intoxication due to drink or drugs or both should be replaced by a statutory provision on the following lines:

- (a) that evidence of voluntary intoxication should be capable of negating the mental element in murder and the intention required for the commission of any other offence: and
- (b) in offences in which recklessness constitutes an element of the offence, if the defendant owing to voluntary intoxication had no appreciation of a risk which he would have appreciated had he been sober, such a lack of appreciation is immaterial.

69. Voluntary intoxication should be defined on the lines recommended by the Butler Committee.

70. In murder or in any other offence in which intention is required for the commission of the offence a mistaken belief arising from voluntary intoxication should be a defence to the charge if such a mistaken belief held by a sober man would be a defence. However in offences in which recklessness does constitute an element of the offence, if the defendant, because of a mistake, due to voluntary intoxication, holds a belief which, if he had been sober, would be a defence to the charge, but which he would not have held had he been sober, the mistaken belief is immaterial.

71. Our recommendations on voluntary intoxication should be applicable to criminal offences generally.

Defences

Self-defence

72.

- (a) The common law defence of self-defence should be replaced by a statutory defence providing that a person may use such force as is reasonable in the circumstances as he believes them to be in the defence of himself or any other person, or in the defence of his property or that of any other person.
- (b) The defence should be confined to cases where the defendant feared an imminent attack.
- (c) There should be no specific provision relating to the retreat rule or the refusal to comply with an unlawful demand.
- (d) Section 3 of the Criminal Law Act 1967 should be amended so that, as regards criminal proceedings only, whether the defendant believed that force was necessary in the prevention of crime or in effecting or assisting in a lawful arrest should be decided on the facts as the defendant believed them to be, but whether the force used was reasonable should be governed by an objective test.
- (e) There should be a provision that, in considering whether the defendant believed he or another or his property or that of another was under attack, the presence or absence of reasonable grounds for such a belief is a matter to which the court or jury is to have regard in conjunction with any other relevant matters
- (f) The burden on the defendant of establishing that he acted in self-defence should only go to adducing sufficient evidence to raise an issue.

73. Where a person kills in a situation in which it is reasonable for some force to be used in self-defence or in the prevention of crime but the defendant uses excessive force, he should be liable to be convicted of manslaughter not murder if, at the time of the act, he honestly believed that the force he used was reasonable in the circumstances.

Consent

74. The common law defence of consent should be continued for the present in the circumstances in which it is now available.

Discipline

75. The common law defence of lawful correction should be continued for the present in the circumstances in which it is now available.

Extra-territorial jurisdiction

76. The courts in England and Wales should have jurisdiction over murder and manslaughter where:

- (a) the defendant's act or
- (b) the infliction of the injury

occurs in England or Wales. They should also have jurisdiction in murder and manslaughter over a citizen of the United Kingdom and Colonies who kills a person anywhere outside the United Kingdom, whether on land or not but such jurisdiction should not extend to attempts to commit those offences.

77. Section 10 of the Act should be repealed without replacement.

78. Our courts should have jurisdiction over an alien whose act here causes death abroad.

79. On a charge of murder or manslaughter a defendant should not be able to plead that his act was not an offence in the country where it was done or that he had a partial defence under the law of that country.

80. It should be an offence to incite, conspire or attempt in this country to commit an act abroad which, if committed here, would amount to murder, manslaughter, causing an explosion likely to endanger life or property (contrary to section 2 of the Explosive Substances Act 1883), causing serious injury with intent to cause serious injury or kidnapping.

81. It should be an offence to incite, conspire or attempt abroad to commit in this country any of the offences at 80 above.

Confidential information

In its 278-page Memorandum No. 40 on "Confidential information", the Scottish Law Commission makes a number of suggestions and poses a series of questions for comment, criticism and consideration.

The report examines the position in contract and in tort, and considers other remedies such as copyright, patents and designs, restitution and recompense.

The provisional proposals and questions to which comment is invited are –

- (i) whatever decisions may be taken on the creation of new rights and obligations, any rights and obligations which exist under the present law of contract and in tort should not be abolished;
- (ii) in the creation of new rights and obligations, it is preferable to resort to general principles of law wherever practicable, rather than to detailed rules;
- (iii) it should be made clear by statute that in an action for breach of contract involving the use or disclosure of information, damages should include, where appropriate, reparation for injury to feelings;
- (iv) there is a case for making it clear by statute that a contractual obligation is enforceable against a third party who knows, or ought reasonably to know, that information has been received by him in breach of contract and that to use it would constitute a breach of that contract;
- (v) the law regarding the circumstances in which obligations of confidence can be implied is not fully developed, and comment is invited whether difficulty has been experienced in practice for this reason. If so, one possibility is to provide by legislation guidelines on the circumstances in which a restriction would be implied on the disclosure or use of information by a person to whom it was communicated, for example in the following relationships: employer/employee, doctor/patient, clergyman/parishioner, lawyer/client, student/teacher;
- (vi) it may be advisable to provide that, where information communicated for the purpose of being stored in a computer, the person to whom the information is communicated and the person responsible for the maintenance of the computer system should both be under an obligation that the information shall neither be disclosed nor used without the consent of the communicator except for the purposes for which it is communicated; and that both the person to whom the information is communicated and the person responsible for the management of the computer system should be held liable for any unauthorised use or disclosure of the information unless they can show that such use or disclosure occurred without fault on their part;
- (vii) should a person, in particular a doctor employed in the National Health Service, who has acquired information under an agreement of confidence, be obliged to disclose it in connection with proceedings in a court of law?
- (viii) are there any guidelines which could usefully be laid down to determine the extent to which disclosure should be allowed in the public interest? In particular, should disclosure be permitted if the information relates to a state of affairs which the public interest requires should not be allowed to continue?
- (ix) it would be desirable, for the avoidance of doubt, to enact a

declaratory provision to the effect that an action based upon the tort of injuria should be competent, where it is claimed that injury to the feelings has been sustained through the disclosure of information about the pursuer, or through the means whereby information about him has been obtained, where these amount to an unwarranted aggression upon the pursuer's person, dignity or reputation;

- (x) if it were thought undesirable to resort to the principles of the *actio injuriarum*, a statutory tort should be introduced, consisting of the use or disclosure of information amounting to a substantial and unreasonable infringement of a right of privacy, accompanied by the same heads of damage, defences, rules of evidence and law of prescription which apply to other branches of the law of tort;
- (xi) if such a statutory tort is introduced, the court might be empowered to order the defender to destroy all articles or documents which had come into his possession by reason of or in consequence of the infringement;
- (xii) if such a statutory tort is introduced, a person should be entitled to be protected from substantial and unreasonable intrusion upon his family. The definition of "family" should not be as extensive as the category of relatives entitled to claim patrimonial loss in terms of the Damages (Scotland) Act 1976, and should exclude in particular uncles, aunts and their issue, and former spouses;
- (xiii) if it were thought undesirable to resort to the principles of the *actio injuriarum*, it would also be possible to introduce a statutory tort, actionable at the instance of any person who has suffered damage thereby, to disclose or otherwise use information which, at the time of the disclosure or use, the discloser or user knew, or in all the circumstances ought to have known, was obtained by unlawful means;
- (xiv) the same principles should, so far as possible, apply to this tort as would apply to the tort described in proposal (x);
- (xv) there should be a special procedure, similar to that which already exists in relation to financial information in petitions for variation of trust, to prevent the proceedings themselves causing further disclosure of the information. This could be achieved by using statements lodged in process, but not printed in the pleadings, to describe the confidential information;
- (xvi) criminal sanctions should be introduced by statute against the following activities –
 - (a) it should be a statutory offence to enter upon premises without the occupier's consent, and without lawful authority, for the purpose of obtaining confidential infor-

- mation or information which is of value, whether or not the information is actually obtained,
- (b) it should be a statutory offence to search or examine the property owned or lawfully possessed by another person without that person's consent, or without lawful authority, with a view to obtaining confidential information or information which is of value. The term "property" should be sufficiently comprehensive to include vehicles, vessels, personal effects and tapes,
 - (c) the use of certain technical surveillance devices should be made a criminal offence. The category of device should include any electronic or optical devices which permit a man of normal sight or hearing to receive visual or aural signals in circumstances in which he would otherwise be unable to do so, or which permit a record of such signals to be made;
- (xvii) the criminal law should not be extended by statute beyond the three categories set out in proposal (xvi).

Incest

The Scottish Law Commission has published Memorandum No. 44 on "The Law of Incest in Scotland". An introduction explains that the prohibition of incest in Scotland still derived from an Act of 1567 founding on the ancient Mosaic law as expressed in Leviticus Chapter xviii. When, in 1969, a committee under the chairmanship of Lord Kilbrandon had considered certain aspects of the marriage law of Scotland, sharp criticism had been expressed of the existing law on the forbidden degrees, both for marriage and incest. While the Marriage (Scotland) Act 1977 (c. 15) had remedied the situation in respect of marriage by providing a clear and comprehensible list of the relations who may not marry, the Act did not directly affect the law of incest. The need for reform of the law of incest in Scotland had long been recognised.

The Memorandum gives the general and historical background to the reference, reviews the present law and discusses the genetic and psychological effects of incest. It goes on to give an account of the law in England and Wales, New Zealand, Canada, Australia, the U.S.A., France, Belgium, Germany and Norway.

In explaining the Commission's approach to the matters in issue, the Memorandum points out that historically, the law of incest in Scotland derives from the dominant religious views in Scotland in the immediate post-Reformation period. However, this society now included persons of various religious beliefs and of no religious belief. Punishment in these circumstances must be justified in terms of society's present ends. The Commission would place high among

those ends the strengthening of the fabric of the family and the protection of its members, especially children, from injury and molestation. Although it had been suggested that incest was merely an offence against a particular moral creed, the Commission could not accept this. The examination of the subject persuaded them that there were good reasons for retaining the crime of incest, though the Commission proposed to narrow the scope of its application to cases where the need for its specific sanctions was most apparent.

In the Commission's view, the reasons why the offence should be retained included the following—

- (a) the reduction of the risk of the birth of children with defects of a genetic origin;
- (b) the prevention of psychological harm to children;
- (c) the maintenance of solidarity within the family; and
- (d) the recognition of the opposition of significant numbers of the community to the idea of sexual intercourse between blood-relatives.

But these considerations applied with full force only within the nuclear family. They did not apply to relationships by affinity and did not apply to all relationships based on consanguinity.

Set out below is the Memorandum's summary of the Commission's tentative proposals, upon which comment is invited—

- (i) incest should be retained as a separate crime;
- (ii) the crime of incest should not be constituted by intercourse between a person and the relatives of his spouse;
- (iii) the prohibition against incest should extend only to the following relationships based on consanguinity—
 - (a) parents and children,
 - (b) brothers and sister,
 - (c) grandparents and grandchildren,
 - (d) uncles and nieces, aunts and nephews, and
 - (e) half-brothers and half-sisters;
- (iv) the illegitimate child should be placed with regard to incest in the same position as the legitimate child;
- (v) sexual intercourse between relations by adoption only should not be characterised as incest;
- (vi) should the protection available under the provisions of the law directed against sexual offences other than incest be extended beyond the age of 16 in the case of female adopted child or step-child?;
- (vii) should increased penalties be available under such provisions in the case of the adopted child or step-child and, if so, should this be by way of removing or increasing statutory maxima?;
- (viii) the present penalty for incest should be retained;
- (ix) incest should not be triable only in the High Court but should also be triable on indictment in the Sheriff Court;
- (x) the present definition of incest, requiring penetration, should be retained and should not be extended to other forms of sexual misconduct presently covered by other offences;

- (xi) as an alternative to prosecution and punishment, provision should be made within the criminal process to secure help and treatment for the victim of incest and the other members of the victim's family.

International Developments

Treaties

Constitution of the World Health Organization as amended done at New York on 22 July 1946. Papua New Guinea's Instrument of Acceptance signed by the Minister for Foreign Affairs and Trade on 7 April 1976 and deposited with the Secretary-General of the United Nations on 29 April 1976. Papua New Guinea admitted as a Full Member of the World Health Organization with effect from 29 April 1976.

Amendments to Articles 24 and 25 of the Constitution of the World Health Organisation, adopted by the Twenty-Ninth World Health Assembly on 17 May 1976. Australia accepted the amendments on 30 March 1977. The amendments are not yet in force.

Amendments to Articles 24 and 25 of the Constitution of the World Health Organisation, adopted on 17 May 1976. New Zealand's Instrument of Acceptance was deposited on 25 March 1980.

Basic Agreement between the World Health Organization and the Government of Papua New Guinea. Signed for the World Health Organization, by the Regional Director in Manila on 27 February 1976. Signed by the Minister for Foreign Affairs and Trade on 28 June 1976.

Memorandum of Agreement regarding Project Execution, Procurement and Use of Funds in Respect of the Bangladesh Population Project done at Washington 4 February 1976. Australia accepted the Agreement on 23 December 1976 and it became effective among all participants on 25 February 1977.

Agreement on Co-operation in the field of Medicine and Public Health between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the German Democratic Republic, Berlin, 14 April 1977 (Cmnd 6914). The Agreement entered into force on 14 April, 1977.

Treaty of the West African Health Community done at Lagos on 25 October 1978 between The Gambia, Ghana, Nigeria, Sierra Leone and Liberia.

The Treaty establishes the West African Health Community, membership of which is open to all the States of the West African Region as defined by the Organisation of African Unity. The Community's objective is to undertake, through co-operation, activities which would contribute towards the attainment of the highest possible standard and protection of health for its peoples.

Convention concerning Occupational Safety and Health in Dock Work, Geneva, 25 June 1979 (ILO Convention 152). The Convention and Recommendation, adopted at the 65th Session of the International Labour Conference, is the longest text adopted on safety and health since the Second World War. It envisages a range of technical and administrative measures designed to ensure the prevention of occupational accidents and diseases to which port workers might be exposed.

It sets out in general terms the objectives to be attained and technical measures concerning installations in docks (surfaces, passageways, container terminals, electrical installations, fire-fighting and first aid facilities), on board ship (holds and cargo decks, hatch covers and hatchways) and lifting appliances and loose gear used in the loading and unloading of ships.

The Recommendation complements various aspects of the Convention in a number of technical details.

The Conference also adopted a Resolution inviting the ILO to increase its assistance to countries wishing to establish training centres for developing instruction in occupation safety and health for dockers.

Convention concerning Hours of Work and Rest Periods in Road Transport, Geneva, 27 June 1979 (ILO Convention 153). The Convention and Recommendation, adopted by the International Labour Conference at its 65th Session, aim at regulating hours of work and rest periods for professional road transport workers.

Some 55 million people are at present engaged in road transport in the world. Conditions of work concern not only the individual employed person and his family but also the safety of all road users. According to WHO statistics, some 300,000 persons are killed annually on the roads and approximately ten million injured.

The Recommendation applies not only to drivers but to wage-earners engaged in transport (mates, conductors, attendants). It contains more detailed provisions than the Convention covering subjects such as normal weekly hours of work, normal daily hours of work, weekly rest and overtime.

Both texts contain provisions for supervision of driving time,

working time and rest periods and indicate the role of the public authorities and employers as well as compulsory inspections and eventual sanctions.

European Convention for the Protection of Animals for Slaughter, Strasbourg, 10 May 1979 (No. 102). The Convention was opened for signature on the same date. The Convention specified uniform rules for the humane treatment of animals in slaughter houses and for the actual means of slaughter.

Additional Protocol to the European Convention for the Protection of Animals during International Transport, Strasbourg, 10 May 1979 (No. 103).

Legislation

Cyprus

The Convention on the Elaboration of a European Pharmacopoeia (Ratification) Law, No. 47 of 1976

This Law ratifies the Convention on the Elaboration of a European Pharmacopoeia done in Strasbourg on 22 July 1964.

Judicial Decisions

United Kingdom

Birching of young offenders

The birching of young offenders as practised in the Isle of Man has been held to be “degrading punishment” in breach of the European Convention on Human Rights. The Isle of Man is a Crown dependency with its own parliament, the Tynwald. Although the United Kingdom parliament may legislate on the Isle of Man’s behalf, it has never done so without the Tynwald’s consent.

The judgment is being studied as well in Guernsey and in Jersey, who also have provisions authorising corporal punishment.

Sunday Times v. United Kingdom

The European Court of Human Rights has held (by 11 votes to nine) that the 1972 United Kingdom Government injunction stopping the Sunday Times publishing an article about the drug, Thalidomide, violated the European Convention on Human Rights, the “freedom of expression” guaranteed by Article 10 of the Convention.

The case arose after parents of children born deformed, allegedly due to their mothers’ use of Thalidomide, had commenced proceedings against the Distillers Company, which manufactured

and marketed the drug. Distillers obtained from the Divisional Court an injunction (on the application of the Attorney-General) against the Sunday Times on the ground that by supplying the information to the public the article tried to bring public opinion to bear on Distillers' attitude. This order was reversed by the Court of Appeal, but restored by the House of Lords on the ground that it was wrong to prejudge the issues in pending proceedings.

The Court while so ruling in support of claims made by the Sunday Times over its right to publish the article, also—

- (i) said that, while the mass media should not exceed limits necessary to the proper administration of justice, it was incumbent on them to impart information on matters of public interest, including those before the courts. The public had a right to such information;
- (ii) rejected the approach taken by the Attorney-General which stressed the need for balance in the conflict between freedom of speech and the fair administration of justice. The court said it saw no choice between two conflicting principles, but rather a clear principle of freedom of expression which must be subjected to certain narrowly interpreted exceptions;
- (iii) stressed that the Thalidomide disaster was a matter of undisputed concern, raising fundamental issues about protection against and compensation for injuries resulting from scientific developments;
- (iv) observed that the families of the Thalidomide victims, who were unaware of the legal difficulties involved, had a vital interest in knowing all the facts: they could be deprived of this crucial information only if it appeared absolutely certain that its diffusion would have threatened the authority of the judiciary—and this was not found to be the case;
- (v) said that the Attorney-General's move to stop publication did not correspond to a social need sufficiently pressing to outweigh the public interest in freedom of expression.

Corporal punishment—whether strapping in schools against wishes of parents' infringement of human rights

The European Commission of Human Rights has held that the punishment imposed on boys in Scottish schools by tawse, a leather strap, against the wishes of their parents, was a breach of the European Convention on Human Rights; Article 2 of the Convention's First Protocol which guarantees the right to education and the right of parents to have their children taught "in conformity with their own religious and philosophical convictions".

Two mothers, whose sons were not punished with tawse, submitted that—

- (a) in one case the mother had asked for, but been refused a guarantee that her child would not be strapped; and

(b) in the other case the boy had been suspended from school after refusing to submit to corporal punishment for climbing a school wall and the Fife education authority would not give an assurance that he would not be liable to such punishment if he returned.

The finding has been referred to the European Court of Human Rights. *G. Cambell and J. Cosans v. U.K.* (The Times newspaper: 14 October 1980).

Rights of a mental patient—right to appeal against detention

The European Convention on Human Rights provides that a person deprived of his liberty should be able to go to a court to challenge the legality of that detention.

One of the five cases submitted to the European Commission concerned a mental patient who was recalled to Broadmoor, the special hospital, after he had been free for three years without (according to the Commission) being given prompt and sufficient reasons for his arrest.

The European Commission found against the U.K. Government on two counts—

- (i) not giving a former patient the reasons for his detention in Broadmoor; and
- (ii) not giving him proper rights of appeal against detention.

The finding has been referred to the European Court of Human Rights and, if confirmed, would result in the redrafting of certain sections of the Mental Health Act 1959.

X v. U.K. (The Times newspaper: 16 October 1980).

Other Developments

Better paternity tests established

The existence of an “almost perfect” method of proving or disproving the paternity of a child was disclosed at a recent international congress in Hamburg. It is based on the examination of between 150 and 170 different factors in the blood, including its protein and enzyme content now known to be hereditary. It has a claimed accuracy of 99 per cent to disprove and 95 to 98 per cent to prove paternity. The new tests have been used to conduct court-ordered examinations in Germany, but are not yet widely known. Professor Hans-Hermann Hope of the West German Central Blood Transfusion Institute explained the method to the congress.

UN Commission on Narcotic Drugs

The Commission, at its recent meeting in Geneva —

- (i) approved plans for more effective action against the illicit production and use of heroin; and

- (ii) called for action to eliminate sharp fluctuations in the supply and demand situation of opiates, as a way to help in establishing adequate international control.

Reasons for an International Convention on Torture

The Secretary General of the International Commission of Jurists has argued strongly that there should be an International Convention on Torture. He notes that it is a crime carried out almost entirely by States acting by their servants or agents, and is a crime committed by the law enforcement agencies whose very duty it is to prevent crime. In this situation, he suggests, external pressure upon offending governments is most important.

Further, imposing obligations under international law would be to elevate the matter to one of international concern and render it no longer one “essentially within the domestic jurisdiction” of the State concerned. The Convention might also extend jurisdiction to try an offence of torture beyond the country where the crime was committed.

He suggests that the argument that only countries which do not practice torture will ratify the Convention is wrong on two counts: first, as with sin, everyone has to declare himself against torture; second, governments change so that a State which does not practice torture under one administration may do so under another more totalitarian regime.

Vasectomy in the polygamous marriage

The Africa Regional Law Panel has endorsed the policy statement on sterilization adopted by the International Planned Parenthood Federation’s Management and Planning Committee—namely, that doctors should, where possible, consult with the other spouse before carrying out a sterilization operation but that consent should not be a legal requirement: in polygamous marriages, doctors should consult all the wives before a vasectomy.

The Panel also recommended that where voluntary sterilization is against the law, Family Planning Associations should lobby for change. Similarly, any barriers should be removed from offering contraceptive services to adolescents, whether married or unmarried.

(Noted at *IPPF News*, September/October, 1977.)

Draft of the Universal Declaration of Animal Rights

The Draft Declaration accepted by UNESCO, 30 years after the United Nations adopted the Universal Declaration of Human Rights, lays down in 14 articles the principles for dealing with the animal world. It declares that—

- (i) all animals are equal and have the same right of existence;
- (ii) the rights of animals must be protected by law against the rights of man;
- (iii) the right of liberty is upheld and acts of cruelty condemned;
- (iv) medical experimentation for scientific or commercial purposes is deplored;
- (v) exhibitions “for the pleasure of man”, such as circuses and zoos, are denounced;
- (vi) the genocide of whole species is deplored.

It is hoped that the United Nations will be able to bring forward a resolution along these lines, before the turn of the century. Furthermore, an interparliamentary association to safeguard the rights of animals has been created with the aim to unite the political parties of every country interested in animal protection and nature conservation, and a new “order of nature” to honour people who have worked for conservation and the defence of the rights of nature and the creatures which make it up has been established.

Charter for protection of plants and animals at risk or endangered species

The 14th General assembly of the International Union for the Conservation of Nature and Natural Resources (IUCN) met in Ashkhabad (26 September—5 October 1978), the capital of Turkmenia in Soviet Central Asia, to consider measures to save plants and animals threatened by extinction and to assess what emergency action must now be taken if certain species are not to become extinct.

One of the main subjects on the agenda was the advance of deserts across the globe. By the year 2,000 the world will lose about a third of its arable land to desert. Other subjects discussed included—

- (i) the influence of water purity on biological productivity of the oceans;
- (ii) the preservation of the habitat of endangered species; and
- (iii) means of increasing soil fertility.

In this connection Britain is to put measures before the Convention on International trade in Endangered species to be held in Costa Rica in March 1979. Trade in wild animals and their skins is closely controlled in Britain and many other countries by a licensing system. Finding it necessary to tighten control of the import and export of manufactured goods of wild animal origin, it is hoped that the new legislation in the United Kingdom would—

- (i) in addition to the leopard skin coats, elephant tusks, and other obvious products of endangered species already under control, add to the list trophy heads, all fur skins of the cat family, parts of bears, otters, exotic monkeys, zebras, elephant and kangaroo hides, all ivory, all rhinoceros horn, even if

powdered and sold for allegedly therapeutic purposes, and reptile skins;

- (ii) for purposes of Customs officers, make clearer the definition of what constitutes the “parts and derivatives of threatened species”.

European Convention on Human Rights

The Legal Affairs Committee, of the Council of Europe Parliamentary Assembly has submitted its recommendations (Council of Europe Doc. 4213 of 27 September 1978) on widening the scope of the Convention, which include the following—

1. Rights connected with employment

30. Given the importance in modern life of work and of conditions of employment, it may be thought that rights connected with employment must occupy a central place in any extension of the convention in the areas under consideration. Although under present economic conditions the right to work itself cannot be included, and although the obligation upon states to aim for full employment cannot be regarded as conferring a directly enforceable right upon the individual, a number of basic rights connected with employment may be appropriate for examination (see also Articles 23 and 24 of the Universal Declaration). Such rights might include

- (i) the right of access to free employment services, to vocational guidance, and to vocational training (Social Charter, Article 1(3), Article 9 and Article 10);
- (ii) the right to just and favourable conditions of work including the right to fair remuneration (Social Charter, Article 4; Covenant, Article 7), possibly including the principle of equal pay for equal work (Social Charter, Article 4(3); Covenant, Article 7(a)(i)) and the right to an annual paid holiday (Social Charter, Article 2(3); Covenant, Article 7(d));
- (iii) the right to strike (Social Charter, Article 6(4), Covenant, Article 8(1)(d));
- (iv) the right to bargain collectively (Social Charter, Article 6(2)).

31. However, there may be some doubt about how far these rights are, on analysis, suited to the system of enforcement provided by the convention. In relation to some of those rights, the correlative obligations are not obligations of the state but of the employer, and the obligations of the state (insofar as the state is not also the employer) are limited to securing that legislation imposes the necessary obligations on employers and provides the necessary remedies for employees. This would seem to be the case for example with the rights mentioned under (ii) and (iii) above. A claim by an employee who had been denied those rights would be brought, in the normal way, against the employer, and the State would be involved, if at all, only if the rights in question had not been fully implemented and protected under national law. Consequently such rights may seem more appropriately provided for under the machinery established by the Charter.

32. Where the state is also the employer, its obligations *qua* employer

will not in principle differ from those of a private employer; indeed they cannot do so from the point of view of a human rights instrument if the rights protected are universal and state employees are not to be put in a privileged position.

33. With regard to the right to bargain collectively, as elaborated in Article 6 of the Social Charter and mentioned under (iv) above, that right seems to be primarily a collective right of workers rather than an individual right to be protected at the instance of the individual under the machinery of the convention. It is true that organizations such as trade unions may bring applications under Article 25 of the convention and reference has already been made to cases brought under Article 11 of the convention which originated in applications by trade unions; but it would seem on a strict analysis of Article 11 that the rights of trade unions are protected only insofar as they are essential for the exercise of the rights of individuals. Although therefore the rights of trade unions can be read into Article 11 by implication, it may be inconsistent with the system of the convention to make express provision for those rights, even if such provision were to be made by way of an addition to Article 11 itself.

a. *The right to choose or accept paid work freely*

34. A right which might be contemplated is that *to choose or accept paid work freely*, in the light of the individual's qualifications for the work concerned and of reasonable geographical and economic considerations. Fundamentally, this right is based in the main on Article 6(1) of the United Nations Covenant which deals with "the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts", and on principles 1–18 of Part I of the Social Charter. Although that right taken alone may seem to add little to the prohibition in Article 4(2) of the convention of forced or compulsory labour, it may acquire considerable significance when read in combination with the prohibition of discrimination in Article 14 of the convention. Again, however, the difficulty arises that a complaint of discrimination in relation to employment would lie primarily against the employer rather than against the state.

The following is one possible form for a draft article:

"Any person residing lawfully on the territory of one of the High Contracting Parties shall be entitled to choose or accept paid work freely, regard being had to his qualifications for the work concerned and to reasonable geographical and economic considerations."

b. *The right of access to free employment services, occupational guidance and occupational training*

35. With regard to the rights mentioned under (i) above, it will be noted that Articles 9 and 10 of the Social Charter oblige the Contracting States for the most part only "to provide or promote" the appropriate services; there is therefore no direct obligation on the part of the states to provide such services in all cases themselves. Under Article 1(3) of the Social Charter on the other hand, the Contracting Parties undertake "to establish or maintain free employment services for all workers" and the formulation of this obligation would therefore make it more suitable for inclusion.

A draft article on this principle might well read as follows—

“Everyone residing lawfully on the territory of one of the High Contracting Parties shall have the right of access to the free employment, occupational guidance and occupational training services existing in that state.”

c. The right to an adequate standard of living in the event of involuntary unemployment

36. A different right in connection with employment which is not protected under the Social Charter could be considered for inclusion—namely the right to an adequate standard of living in the event of involuntary unemployment. The recognition of that right is indeed an indirect recognition of the right to work. However, its somewhat negative aspect may make it inappropriate for inclusion in isolation from other rights connected with employment since it might seem unfortunate if the only one of those rights to be protected were a right consequent upon the loss of employment. Possibly such a right could be included in conjunction with other rights such as the right to free employment services. In substance it might comprise the measures of protection enunciated in Article 25 of the European Convention on the Legal Status of Migrant Workers. It could also reiterate the protection provided for in Article 24(2) of that convention in the event of unwarranted cancellation of a work contract.

Article 24 of the convention reads as follows—

Expiry of contract and discharge

1. On the expiry of a work contract concluded for a specified period at the end of the period agreed on and in the case of anticipated cancellation of such a contract or cancellation of a work contract for an unspecified period, migrant workers shall be accorded treatment not less favourable than that accorded to national workers under the provisions of national legislation or collective labour agreements.

2. In the event of individual or collective dismissal, migrant workers shall receive the treatment applicable to national workers under national legislation or collective labour agreements, particularly as regards the form and period of notice, the compensation provided for in legislation or agreements or such as may be due in cases of unwarranted cancellation of their work contracts.

Article 25 of the convention reads—

Re-employment

1. If a migrant worker loses his job for reasons beyond his control, such as redundancy or prolonged illness, the competent authority of the receiving state shall facilitate his re-employment in accordance with the laws and regulations of that state.

2. To this end the receiving state shall promote the measures necessary to ensure, as far as possible, the vocational retraining and occupational rehabilitation of the migrant worker in question, provided that he intends to continue in employment in the state concerned afterwards.

The following is a possible draft article—

“Everyone lawfully residing in the territory of one of the High Contracting Parties who is in a situation of involuntary unemployment so found by the competent authorities, has the right to an adequate standard of living.”

2. *Rights connected with health, social security and social welfare*

37. These rights are covered by Articles 11, 12, 13 and 14 of the Social Charter and by Articles 9–12 of the United Nations Covenant. The following might be considered for inclusion in the new Protocol—

- (i) the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing (of Covenant, Article 11(1));
- (ii) the right of everyone without adequate resources to be granted adequate social and medical assistance (of Social Charter, Article 13(1)). This right would have to be more precisely defined and the term “social assistance” given a more concrete form.

38. A possible starting point for the formulation of such rights might be found in Article 25(1) of the Universal Declaration on Human Rights, which provides—

“Everyone has the right to a standard of living adequate for the health and well being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.”

39. However, it seems preferable to begin more modestly by perhaps guaranteeing the right to be affiliated to a social security scheme that provides adequate protection against illness, unemployment, old age, etc. This approach is based on Article 12 of Parts I and II of the Social Charter and Article 18 of the European Convention on the Legal Status of Migrant Workers. A difficulty with this approach might be to determine the qualification for benefits under the scheme, particularly where conditions of residence, periods of employment etc. were required. It may therefore be desirable to provide for certain minimum guarantees which are absolute and not dependent upon the fulfilment of such conditions.

A draft article might read—

“Everyone engaged [lawfully] in a gainful occupation on the territory of the High Contracting Parties shall be entitled to join a social security system.”

The word “lawfully” in square brackets is intended to cover the case of foreigners engaged in gainful occupations without being registered officially.

3. *Educational and cultural rights*

40. These rights are covered by Articles 26 and 27 of the Universal Declaration and Article 13 of the Covenant of the United Nations.

The right to education is sufficiently fundamental and universal to be included. It is also capable of being defined with precision (unlike perhaps the vaguer cultural rights). It would be possible to formulate certain positive rights in relation to education along the lines of Article 13 of the Covenant, e.g. primary education free of charge (Article

13(2)(a) of the Covenant). However, caution would be necessary in formulating such rights, since the right to education itself is already guaranteed, albeit in negative form, by Article 2 of the First Protocol which provides—

“No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the state shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions.”

41. The first sentence of that article has been construed by the European Court of Human Rights in the *Belgian Linguistic Case* (Judgment of 23 July 1978) as guaranteeing the right of access to existing educational institutions, and the right to have recognized the studies completed there. The second sentence was interpreted by the Court in the Case of *Kjeldsen, Busk Madsen and Pedersen* (Judgment of 7 December 1976) as implying that the state, in fulfilling the functions assumed by it in regard to education and teaching, must take care that information or knowledge included in the curriculum is conveyed in an objective, critical and pluralistic manner, and as prohibiting the state from pursuing an aim of indoctrination that might be considered as not respecting parents' religious and philosophical convictions.

42. It is possible that the interpretation of the article will be further developed in the case-law of the Commission and the Court, and there is therefore a risk that the inclusion in a new Protocol of rights relating to education would inhibit such developments, since it will be argued that the article cannot be interpreted so as to guarantee rights which are the subject of such a Protocol. Hence if the new Protocol is not ratified by all Contracting Parties such a right could not be invoked against a state which is not a party to the Protocol and the effect might be actually to reduce the degree of protection afforded by the convention system. It would perhaps be best to formulate a new article on education which would not enter into force until all Contracting parties to the convention had accepted it, when it would supersede Article 2 of the First Protocol.

43. A particular issue might arise in relation to the continuance of private schools, provided for by Article 13(4) of the United Nations Covenant. The possibility cannot be excluded that Article 2 of the Protocol may be interpreted as requiring tolerance of private schools.

F. Relations with other international instruments

44. The question of overlap with other international instruments will inevitably be raised. The fact that certain rights are already recognized in other international instruments (including the EEC Treaty and the regulations made under that treaty) should not however be regarded as a reason for not including those rights in the convention system. Indeed it is inevitable that such overlapping will occur, given the strength of the movement for the recognition of the new rights. Moreover if any such rights are suitable on other grounds for inclusion in the convention system, that system will provide a remedy which is not otherwise available. In fact the widespread recognition of those rights should rather be treated as a reason for including them in the convention system and protecting them by that unique remedy. As for relations with the European Social Charter, it appears from this study that there is no risk

of any large-scale “take-over” of the Charter since the convention system will only admit the adoption of a limited number of fundamental rights, whose fundamental character the Charter itself has helped to establish. The Charter will remain the main international instrument for the protection of economic and social rights.

45. Indeed the contrast between the convention system and the Charter system may be misplaced in this respect, since although the convention provides a direct remedy for the individual its true effectiveness has been to remedy defects in national laws and practices rather than to provide the individual with a cure for his particular complaint. The convention and the Charter could therefore be seen as complementary means, within a limited area of truly fundamental rights, of achieving the same aim, namely the effective implementation of those rights for the benefit of society at large in the member states of the Council of Europe.

Survey of Abortion Laws in the Commonwealth discussed

The Commonwealth Parliamentary Conference in Jamaica in September discussed the subject: “the need for up-dating medical legislation on abortion in the Commonwealth”.

Introducing the subject, Senator Michael Beaubrun, Professor of Psychiatry at the University of West Indies, Trinidad, noted the gradual liberalising of laws relating to abortion over the past decades. He observed that in many parts of the Commonwealth, laws remain which are not only outdated but have become virtually unenforceable because of the advance of new technologies.

“Modern medical technology has blurred the distinction between contraception and abortion so that some of the new family planning techniques might technically offend against existing laws,” he said.

He cited, as one instance, the “morning after pill” and noted that, although technically an offence against abortion laws in most Commonwealth countries, its use was virtually impossible to detect so that there was an unenforceable law, which was *ipso facto* a bad law.

Referring to the recent birth of a “test-tube” baby in the United Kingdom, he said this showed that contraception or fertilisation can take place actually outside the woman’s body, which was quite beyond the capacity of existing laws to deal with.

Although he himself felt the need for increasingly permissive abortion laws, Dr. Beaubrun stated that the purpose of his presentation was more modest.

“It would be both presumptuous and unwise [for me to urge you to accept my view]. Every country has its peculiar circumstances to consider. The attitudes of its people are borne of different social, political, religious, economic and other considerations. As parliamentarians, it is true that we lead the people but we also serve the people, and we must take into account their views and even their prejudices,” he explained.

He said his object was merely to draw to delegates attention the Commonwealth Secretariat publication, "Three Studies of Abortion Laws in the Commonwealth". While the Preface to that Report stated that it was recognised that some countries were confident that their laws were already adequate and reflected the values and needs of their own society, and that the Report had little relevance for them, Senator Beaubrun urged delegates not to jump to this conclusion too readily – even those who had advanced laws.

The Senator concluded by inviting delegates to push for the establishment of revision or reform committees in their respective countries to bring their laws up-to-date. He said he would not suggest what those reform committees would find, but merely say that if the reform committees were filled with women, countries were unlikely to go wrong.

Senator Jean Melzer, Australia, supported Dr. Beaubrun, arguing that women had the right to decide for themselves. "I don't think the father of the child has the right to decide, and I do not think the legislators have the right to decide," she said.

Not all the Australian Senator's colleagues agreed on the degree to which men should be involved in abortion decisions. One delegate said that where a married couple was involved, it should be a joint decision.

Other delegates pointed to the present laws as legislating mostly against the poor, since the rich could always get abortions, and to the results of unwanted children in countries and regions with problems of over-population in relation to their economic and employment resources.

The Maltese delegation leader, the Hon. Daniel Micallef, expressing a contrary viewpoint, suggested that there was a vacuum in the Declaration of Human Rights, as the rights of the unborn child were not protected.

"Most countries seem to agree that the rights of the unborn child do not matter," he said. "To my mind and conscience this is a compromise between justice and convenience".

International year for disabled persons 1981

The Advisory Committee, meeting in Vienna (20–29 August 1980), has adopted a basic long-term draft Plan of Action designed to realise two goals for the year—

- (i) full participation of disabled persons in the social life and development of their societies; and
- (ii) living conditions equal to those of other members of their societies.

The emergent world plan would provide for action at national, regional and international levels on a short, medium and long-term basis. Among the undertakings would be an analysis of the world situation of disabled people and a study of the effects of social, medical and environmental conditions upon disablement.

Articles

Child Protection in Tasmania

In 1972 a committee was set up in Tasmania by the then Attorney-General "to coordinate the activities of persons or bodies in any way involved with children under 7 years of age who had suffered or were suspected of having suffered non-accidental physical injury arising out of the wilful act or omission of any person or persons caring for them". This Committee, called the Childhood Injury Investigation Committee, was composed of a wide range of people professionally involved with the care of families and children.

Experience in Tasmania and in other parts of the world has shown very clearly that failures in communication between those trying to help families which are surrounded by problems can have very serious consequences. There have even been cases in other countries where children have died as a result of maltreatment, even though they and their families were well known to various welfare agencies and were even being visited from time to time. It was partly in order to eliminate these failures of communication that the original committee was set up.

The Committee did a great deal of useful work, but it operated under difficulties. Not having been set up by Act of Parliament, it had no statutory powers. It could not compel anyone to carry out its orders, it had to depend entirely on persons voluntarily notifying cases, and it was very difficult to manage cases arising throughout the State by a Hobart-based Committee. It also could not require children to be taken to hospital for examination or ensure that cases

It was, therefore, replaced in January, 1975 by the Child Protection Assessment Board. This was set up under the Child Protection Act of 1974, and today has the overall responsibility in this State for the protection of children up to the age of 12 years from physical abuse.

Under its statutory powers, the Board has appointed upwards of 50 authorised officers throughout the State. Anyone who has grounds for believing or suspecting that a child has been injured non-accidentally may report to an authorised officer and certain classes of persons who habitually have the care and custody of children are required by law to report such cases. Anyone reporting voluntarily or by requirement of law is protected from any action for defamation or any other type of action for damages in respect of such report. The

report is also entirely confidential and no person may be required to give evidence in Court on the contents of the report. The authorised officers have powers enabling them to ensure that a child suspected of having been ill-treated is to be admitted to hospital straight away for full medical examination. Simultaneously the authorised officer informs the Board and it arranges for a social worker to investigate and report to the Regional Committee. In this way speedy assessment of the medical and the social welfare sides of the case is possible, and the Regional Committee can take on the management of the case with full medical and other information regarding both the child and the family.

It should be stressed that the object of the Child Protection Act and of the Board is not to punish, but to help. In fact, there is no mention whatsoever in the Child Protection Act of any penalties at all. The Act is concerned with removing children from situations of actual or potential danger. Sometimes this means taking children out of their home for a time, but the aim is always to restore children to their parents as soon as it is safe to do so.

To oversee the ongoing assessment and rehabilitation of families which come to its notice, the Board has set up Regional Committees in Hobart, Launceston, Burnie and Devonport and, if necessary, these will be extended to other areas. These committees are composed of the people professionally involved with families which are surrounded by problems, and include among their members, doctors, nurses, welfare officers, guidance officers, probation officers and social workers. Representing as they do a wide range of professions, organisations and Government departments, the committees reduce the communication problems which can be so troublesome, and enable an overall view of the case to be assessed without any undue emphasis on any particular aspect.

In recent years much publicity, some of it frankly sensational, has been given to the problem of non-accidental injury to children. It should, however, be stressed that many of these unfortunate occurrences are the result of pressures, frustrations, overwork, social or housing conditions which would try the patience and self-control of most of us, and it is unfair in most cases to regard the parents as criminals or monsters. The Child Protection Assessment Board and its Committees are mindful of this, and consequently their concerns are protection of children and rehabilitation of families. Retribution and punishment is no part of their task.

In the first 12 months of the operation of the Child Protection Act, over 40 cases were referred to the Board.

Research has conclusively shown that a proportion, probably as high as one quarter, of severely battered children are permanently affected in some way, and that battered children grow up to be battering parents. With sufficient effort and skill, this vicious circle can, however, be broken.

The study of non-accidental injury to children is a comparatively new field, and it has taken time to work out and set up the necessary administrative and other machinery to operate the Act, and also for all concerned to develop special skills in diagnosis, assessment, and treatment. There is, however, plenty of scope for further development, now and in the foreseeable future, and we recognise this and are planning accordingly.

Whilst within certain statutory limitations we feel that our measures for child protection are functioning fairly well, we cannot afford to be complacent about this extremely important issue, and are constantly striving to improve the services which we can offer families and children. We are concerned as a high priority with working out educational and other preventive measures so that we can tackle the question of child abuse at its source and not merely after the abuse has occurred. We are seeking amendments and improvements to the existing Child Protection Act to enable us to undertake these additional functions. Provided we are given the necessary statutory powers, we hope to be able to improve very considerably on present services.

W. H. Goudie

Legal Abortion Services in Canada

Legal Abortion Services in Canada

Late in September 1975 a committee under Sociology and Behavioural Science Professor Robin F. Badgley was established through the Federal Justice Minister "to conduct a study to determine whether the procedure provided in the [Canadian] Criminal Code for obtaining therapeutic abortions is operating equitably across Canada". Canadian abortion law at that time was under critical scrutiny, but the committee was required to "make findings on the operation of this law rather than recommendations on the underlying policy". Accordingly, the Badgley Committee, in its 474-page Report on the Operation of the Abortion Law released in February 1977, refrained from legal analysis, and simply recorded practice on availability of abortion services, and attitudes that influence availability.

It was all too obvious, even before the Committee was established, that the only answer to the question whether the procedure for abortion was operating equitably across Canada was that it was not. Both proponents and opponents of easier abortion provisions agreed that particular availability was governed more by geography and economic means than by an abortion applicant's medical con-

dition. The *Morgentaler* cases (see B.M. Dickens “The *Morgentaler* Case: Criminal Process and Abortion Law” (1976) 14 Osgoode Hall Law J. 229) had shown the obstacles to access to facilities for termination of pregnancy in Montreal, a city well served with hospitals. Successive juries had acquitted Dr. Henry Morgentaler of performing abortions in breach of conditions laid down in the Criminal Code, on the ground that it had been necessary for him so to act to preserve his patients’ health because prompt and affordable hospital abortion services were inaccessible.

The Badgley Committee has detailed the facts and dynamics of inequality in access to abortion services in Canada, and tells a tale on which stronger conclusions can be based than appear in the Report. Committee members were faithful to the constraints limiting evaluation of existing law, but also diluted their observations in order not to attract vituperative criticism from pro- and anti-abortion factions. Neutrality was further assisted, and compelled, by the two Committee members serving with Professor Badgley being associated with factions opposing each other.

Understandable though restraint in evaluation of the law may be, one may nevertheless regret that the Committee failed to undertake necessary legal analysis. No hint appears in the Report of the *Morgentaler* judgments that revealed the potential for lawful abortion outside the machinery provided by the Criminal Code. The Committee’s references to illegal abortion are thereby rendered less convincing, since Dr. Morgentaler’s services might have come within their concept of illegality even though the courts had defined circumstances in which they could amount to legal abortion. A more important oversight, however, is that, while the Committee dealt fully with termination of pregnancy, they entirely disregarded the problem of its commencement.

Abortion was treated as arising after pregnancy is established or reasonably suspected, but certain contraceptive means take effect before this stage is reached. Intrauterine devices in particular seem to operate by preventing implantation of a fertilized ovum (See V. Tunkel “Modern Anti-Pregnancy Techniques and the Criminal Law” [1974] Criminal Law R. 461), and both pre- and post-coital drugs may operate contraceptively upon such ova to obstruct their biological progress. The use of these techniques of fertility control is likely to grow with developments in prostaglandin and other “morning after” treatments and post-coital menstrual extraction. Religious doctrine, especially that of the Roman Catholic church, is inclined to hold pregnancy and ensoulment to occur upon fertilization of the ovum, not at the later stage of implantation, and accordingly would consider loss of the fertilized unimplanted ovum as abortion. The Canadian Criminal Code provides for up to life imprisonment for use of any means for illegally procuring another’s

abortion, but no longer condemns making available means of contraception. It would seem important to know the difference.

The law

The Criminal Code provides in s. 251 that procuring abortion (the Code speaks only of "miscarriage") is illegal unless undertaken by a qualified medical practitioner acting in an accredited or approved hospital after the hospital's therapeutic abortion committee has certified that in its opinion "continuation of the pregnancy . . . would or would be likely to endanger [the female's] life or health". The physician must not be a member of a therapeutic abortion committee for any hospital, and a committee must have not less than three members each of whom is a qualified medical practitioner, and may decide by majority. It follows that a hospital must have a minimum number of physicians to operate provisions of the Criminal Code, but that it is not compulsory for a qualifying hospital to establish a committee. While an "accredited hospital" is so recognized by the Canadian Council on Hospital Accreditation, an "approved hospital" receives its status under rules established by its provincial Ministry of Health.

Findings

The Committee found that many physicians and nurses, to say nothing of patients, did not know the terms of the abortion law, and on being questioned revealed significant misapprehensions as to its provisions. It was found that "lack of knowledge or inaccurate knowledge about the law poses a major dilemma in how its procedures operated in practice" (p. 66). Nevertheless, the Report records an analysis of the Committee's findings on provisions made for lawful abortion, and attitudes held in the medical, nursing and wider communities. The committee's major findings of fact were that "the procedure provided in the Criminal Code for obtaining therapeutic abortion is in practice illusory for many Canadian women" (p. 141), and that "the criteria used by hospital therapeutic abortion committees across Canada were inequitable in their application and their consequences for induced abortion patients" (p. 279).

Provision of abortion services. Of all civilian hospitals in Canada in 1976, 20.1 percent had established a therapeutic abortion committee. Of hospitals that conformed to requirements of eligibility to perform therapeutic abortions, whether set by their provincial Health Ministry or otherwise, 48.5 percent had a committee in existence in 1976. There was, however, no uniformity across the nation in standards of medical care or facilities required for eligibility of general hospitals, and a facility qualifying in one province might fail to qualify in a contiguous province. Two out of five

Canadians did not live in communities served by hospitals eligible to establish committees.

Hospitals equipped with committees often imposed internal rules to prevent accommodation of abortion patients coming from outside the area they attempted to serve with their full range of facilities. For instance, some reserved their treatments in favour of women who had resided in that area for a given time before applying for therapeutic abortion, and others set a periodic quota for these operations, to preserve a balance with their other procedures. The Badgley Committee found that "the combined effects of the distribution of eligible hospitals, the location of hospitals with therapeutic abortion committees, the use of residency and patient quota requirements, the provincial distribution of obstetrician-gynaecologists, and the fact that the abortion procedure was done primarily by this medical speciality resulted in sharp regional disparities in the accessibility of the abortion procedure" (p. 28).

The response that services should be more uniformly available may be resisted, however, since to spread operations more evenly, perhaps in proportion to the source of requests for them, may increase complication rates. The Committee found that specialisation, associated with concentration, increased proficiency, and that "the hospitals performing the largest number of abortions had the lowest complication rate in spite of performing a larger number of abortions, in the later stages of gestation" (p. 29). The committee accordingly favoured concentration of performance of abortion procedures in regional centres with a full range of required equipment and facilities, staffed by experienced and specially trained nurses and medical personnel. Such centres could also serve to relieve pressure on general hospitals whose staff were reluctant to engage in these procedures.

Delays. Safety in abortion is associated with the patient's stage of gestation, and the Committee favoured making abortion available at the earliest stage possible. It was found that on average, women took 2.8 weeks after first suspecting pregnancy (not after *becoming* pregnant) to visit a physician, and that after this the average interval was 8 weeks until the induced abortion operation was done. The delay resulted from the manner in which physicians, hospitals and abortion committees dealt with applicants. Among women pregnant 16 or more weeks (that is, well into their second trimester), one in five had no therapeutic abortion committee in her local community hospital. Physicians' unawareness of the length of delay in delivery of abortion services was apparent in their responses to the national survey of physicians undertaken by the Committee; only one out of 200 reported the average length of time between initial consultation and performance of the abortion procedure to be eight weeks.

There were found to be two related further effects of delay. A woman going through the abortion committee process and being

refused would find a procedure in the United States more difficult, both to experience and to afford; and commercial referral agencies arranging abortion in U.S. clinics, if they actually disclosed that abortion is legally available in Canada, pointed to the delays involved, in order to make their alternative appear more attractive and its cost worthwhile.

Therapeutic abortion committees. The Badgley Committee was unable to comment upon the aspect of the functioning of abortion committees the lawyer would find most disturbing, namely the complete absence of any entitlement of applicants to due process. Provision exists in the Criminal Code for a provincial Health Minister to receive a copy of a certificate authorising an abortion, together with such other information relating to its issue and the procedure conducted under it as he may require, although no Minister appeared ever to have taken this initiative. There is no provision, however, for a Minister, an applicant, her physician or any other person to receive grounds of refusal of an application.

The need for means to question decisions (other than by application to another committee) may appear from evidence of committee requirements. The formula of the Criminal Code must be observed, of course, but many committees impose additional and at times idiosyncratic demands. A number has residence tests, quotas and gestational limits, but beyond that many had a series of further requirements. Two-thirds (68.4 percent) of committees required consent of the woman's spouse if she was married, and one out of five (18.4 percent) required this even if the couple was separated or divorced. Some committees required consent of the male responsible for conception even if the woman had never been married.

The legal defensiveness of these requirements is obvious, but they may appear to make poor social sense. If a couple is agreed as to the procedure, for instance, the male's consent adds nothing, and if they are disagreed, perhaps endangering the future stability of the relationship, it may be oppressive to the female to afford the male the means to prevail. Further, by withholding consent, a spouse might compel continuation of his wife's pregnancy by another man, leading to birth to a wife he might leave of a child he might have no obligation to support. In any event, since abortion can be done only when "continuation of the pregnancy would or would be likely to endanger . . . life or health", creation of a veto power in a spouse or less closely related person may appear unjustifiable.

Related to provincial laws on the age of majority, it was found that "there was a diversity of consent requirements relating to the age of the woman and to [consent of] the father" (p. 238). The age of consent to medical treatment appears to range from 14 in Quebec to 19 in some Maritime provinces, even though the general provincial age of majority may be higher; in Quebec, for instance, it is 18. This leaves open the way to uncertainty, since some committees observe

the age of consent to medical treatment (in Ontario, for instance, 16), while others in the same province observe the general age of majority (in Ontario it is 18). Below the age of majority or medical consent, which may be above the age of marriage, the position is even less certain since the girl's parents may disagree as to therapeutic abortion, and a spouse or other male causing the pregnancy may himself be a minor.

Reasons upon which abortion committees have allowed abortions are not more satisfactory. The Criminal Code accommodates no eugenic indication for abortion, such as gross abnormality of the fetus, nor a juridical indication of rape or incest. Nevertheless, in 87.7 percent of hospitals, the possibility of deformity or congenital malformation of the fetus was considered in review of a pregnant woman's history, and "pregnancy resulting from rape or incest was a consideration given high priority by therapeutic abortion committees, most of which (80.6 percent) considered their occurrence as valid reasons for the approval of a therapeutic abortion" (p. 265). Many committees considered in addition the effect of continuance of a woman's pregnancy on the health of her family, the economic implications of pregnancy, its extramarital origin and her age if below 18 or over 40. A majority, however, (68.5 percent) was not prepared to support an application solely on the grounds of terminating an out-of-wedlock pregnancy.

Professional attitudes. Among doctors in the national physician survey, the issue of therapeutic abortion cut across all social backgrounds and types of medical practice experience. Almost half feel that induced abortion lowers the value of human life, and when physicians of this persuasion constitute a majority of an eligible hospital's medical staff, their views significantly determine the hospital's position on whether to set up an abortion committee and provisions under which an existing committee operates. Conversely, almost half of the physicians in hospitals without committees said they would be prepared to serve on such a committee if it were established. Generally, however, the hospital's position reflects the majority view of its physicians.

The decision of two-thirds of eligible hospitals without committees was based on grounds of religious morals and professional ethics. A quarter of such hospitals are owned by or affiliated with religious denominations, and rather than become involved in abortion procedures they express a preference to change ownership, to close or to transfer their services to other patient treatment programs.

Most hospitals reported no recent problem involving staff recruitment for abortion services, but one out of six hospitals did not employ staff who felt unable to provide care for all patients. Evidence exists that some, though few, nurses feel and express hostility to abortion patients, and penal attitudes have been demon-

strated in the rare practice of showing the patient the aborted fetus.

Recourse to the United States. About ten thousand Canadian women a year (about one in six having abortions) have recourse to U.S. facilities, and commercial and other referral agencies are available to ease arrangements. Some commercial agencies misrepresented both Canadian law and the actual costs involved in proceedings in Canada. The Committee found reasonable doubt about the propriety of their work, but that "they existed because there was a demand for their services which was not otherwise being met" (p. 386). Non-profit voluntary associations have been active over several decades, however, in arranging procedures, although this is seldom their central purpose. Of community agencies and branches of the Planned Parenthood Federation of Canada (used by just over 7 percent of patients surveyed) 66.1 percent at least occasionally referred women to U.S. facilities, the rate for agencies in Ontario, Quebec and the Maritime provinces exceeding 80 percent. Of such agencies, 75.8 percent recommended this course if a woman's application had been refused by a Canadian abortion committee.

The legality of access to out-of-country facilities was confirmed in the third *Morgentaler* trial, when prosecuting counsel asked Dr. Morgentaler why he had operated in Montreal when he could have referred his patients to U.S. facilities. Access to the convenience of such facilities is limited, of course, to those able to pay the travel and treatment costs involved.

Birth Control. A major thrust of the Badgley committee's findings is towards better spread and use of information on contraception, and the Federal Health Minister's immediate response to the Report was to give undertakings, including on diversion of funds, to promote better birth control information. The Committee found that "a sizeable number of Canadians have had no formal instruction on the use of contraceptive means; the physician is seen as the chief source of such information for women and men; and learning about these methods from all other sources is very much a hit-or-miss affair" (p. 367). Other sources included schools, churches, community agencies and public health departments. Notably absent from mention as a source of information were newspapers, radio and television (see B.M. Dickens "Eugenic Recognition in Canadian Law" (1975) 13 *Osgoode Hall Law J.* 547 at pp. 554-5). Ironically, it was found that "in its work abroad Canada has helped to initiate on a cooperative basis with other nations the components of a comprehensive family planning program. This endeavour stands in sharp contrast to the efforts in these respects which have been undertaken in this country" (p. 419).

More public money is spent on providing treatment services and facilities for abortion patients than on the public effort to undertake effective preventive measures. The Committee found that the

options are few concerning induced abortion. There is no evidence that its volume is decreasing and, indeed, its reported incidence has increased in recent years. The critical social choices are between the two sensitive issues of induced abortion and family planning.

The Committee considered the evidence conclusive, and found that when effective contraceptive means are appropriately used, the chances of conception occurring are sharply reduced, if not eliminated, for most women. The extent of induced abortions in the future can be expected to remain the same as at the present time, and it may gradually rise, unless there are effective changes made in the contraceptive practices of Canadians. Made in the context of known family planning and population policies, these changes may be brought about by increased efforts through research to find more effective and acceptable methods of contraception and by coordinated programs of public education and health promotion. The Badgley committee warned that "there is no surety that such steps will be fully effective, but without taking them, there is virtually no likelihood that the volume of induced abortion will be reduced, or even contained at its present level" (p. 377).

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1979 Commonwealth Medical-Legal Workshops

Reports have now been published of medical-legal workshops held in 1979 in Barbados (June) and Malawi (October). The workshops were organised by the Commonwealth Secretariat and in response to a suggestion made by Commonwealth Health Ministers when they met in Wellington, New Zealand in 1977. Funded by the Commonwealth Fund for Technical Co-operation, and with a substantial contribution from the International Planned Parenthood Federation each covered the same set of issues and considered discussion papers which covered—

- (a) legislation on the use of paramedicals for primary health care;
- (b) legislation on commercial advertising inimical to health;
- (c) the law on medical termination of pregnancy, and related issues; and
- (d) legislation on medical drugs.

Participants were enthusiastic, and universally agreed that joint exercises of this kind were invaluable, holding the potential (in fact

realised at Barbados and Blantyre) of making significant and tangible contributions to the well-being of their publics. All left with a heightened and informed consciousness both of the problems and of their own role in meeting them: and all were pledged to ensure that the momentum created by the workshops be not lost. Follow-up strategies were given special considerations.

The conclusions reached in Barbados were as follows—

Legislation on the use of paramedicals for community health care

- (i) Governments could usefully review the legal arrangements which affect the training, authorisation, practice and supervision of paramedical personnel, as a means of nationalising the delivery of primary health care services.
- (ii) Such an examination should ensure that where the roles of paramedical personnel are expanded, such personnel are afforded appropriate legal protection.
- (iii) Where new cadres of paramedicals are created, or where it is found that cadres are functioning without appropriate legislative recognition, these personnel should be given legal status.
- (iv) It is timely for the roles which traditional practitioners play in the delivery of health care to be reviewed, and, where appropriate, the limits of their practice should be regulated.
- (v) The establishment of regional advisory groups should be considered, to study the question of the role of paramedical personnel in the delivery of primary health care.
- (vi) These groups could explore ways in which regional co-operation might be undertaken in this connection.
- (vii) These groups could also consider such matters as setting standards and harmonising the selection, training and supervision of paramedicals throughout their respective regions.
- (viii) The Secretariat should continue to act as a conduit for information and documentation on the use of paramedicals in primary health care.
- (ix) The Secretariat should continue to support efforts to establish a medical-legal dialogue on the use of paramedicals in the delivery of primary health care.
- (x) The Secretariat should provide, on request, appropriate technical assistance to Commonwealth governments in connection with the use of paramedicals for primary health care.

Legislation on commercial advertising inimical to health

- (xi) Governments should consider establishing appropriate machinery to enable physicians, lawyers, public administrators and policy-makers to tender joint advice on measures to control advertising inimical to health.
- (xii) Governments should also consider undertaking broad and aggressive educational programmes, using all available means of

public communication, in conjunction with the adoption of such legislation as may be necessary to control the advertising and use of products inimical to health.

(xiii) Governments and health professional associations should consider taking all possible steps to prevent the use of health professionals, and persons posing as health professionals, to promote the sale of products inimical to health.

(xiv) Regional machinery should be established to examine the practicability of regional measures for the control of both direct and indirect advertising inimical to health, to promote inter-governmental and multi-disciplinary discussion of the problems, and to facilitate the exchange of relevant information.

(xv) The Secretariat should collect legislative and educational material from member countries and elsewhere, to assist governments to control the advertising and use of products inimical to health.

(xvi) The Secretariat should take such steps as are necessary to provide member governments with information on the effectiveness of both direct and indirect advertising of products inimical to health.

The law on medical termination of pregnancy and related issues

(xvii) The material before the workshop, and the experience of participants, suggested that existing laws in many countries may be out-dated and in some instances may create health risks. Where this situation exists, legislative reform is the only remedy. The options which emerged were simple repeal, which may be unacceptable, or the introduction of an advanced law. Those concerned with the drafting of advanced laws could learn from the experience of countries which already had advanced laws, and in this way avoid repeating some of their faults.

(xviii) It was desirable for the legal formalities in advanced laws to be kept to a minimum, to allow procedures for termination at the earliest possible stage of pregnancy.

(xix) Notwithstanding the desirability that termination should be at an early stage, care should be taken to ensure that it is the woman's real and considered wish that her pregnancy should be terminated, and also to ensure her protection from undue pressure.

(xx) Consideration might be given to decriminalising abortion during the first twelve weeks of pregnancy.

(xxi) It was considered important that abortion services should be rendered by adequately-qualified, but not over-qualified, personnel. In principle, it seemed that the person providing general health care for the community should be responsible for providing abortion services. If this person were a registered medical practitioner, there did not appear to be any reason why other

qualifications should be sought unless they were required for specialised procedures.

(xxii) Consideration should be given to authorising suitably-trained paramedical personnel to provide early abortion services under appropriate supervision.

(xxiii) It was considered appropriate for abortion for adolescents to be regulated under comprehensive provisions for fertility control and education. Ideally, parental concurrence should be sought, but when this is not available or is refused and the minor seeking abortion is left in jeopardy to life or health then naturally the patient's interests should prevail. In such cases there might be an alternative source of permission: perhaps the minor and her physician might have immediate access to an independent public officer, such as an Official Guardian or Children's Ombudsman, to present evidence and apply for legal authorisation by this officer *in loco parentis*.

(xxiv) In the case of adult patients—and also minors, subject to (xxiii) above—it was seen as desirable to minimise the need for third-party consents in legislation. Most participants felt that only the informed voluntary consent of the patient, competent to give consent, on whom the procedure is to be performed should have to be obtained.

(xxv) Pending possible implementation of an advanced law, measures should be considered which would ease physicians' fears of acting under existing laws. These could include the development of a check-list of items which physicians could show they had taken into account in their decisions, in order to demonstrate their good faith. Emphasis on physicians' good faith directed to the welfare of patients might do much to remove the criminal taint from abortion procedures.

(xxvi) It was desirable that providers of health care who claim conscientious objection to being involved in abortion should be required to refer patients to personnel or agencies known not to be averse to the procedure. However, the workshop saw no room for conscientious objection in cases of emergency or post-abortion case.

(xxvii) Ideally, abortion services should be rendered in facilities offering general female health services, sterila sterilisation and breast self-examination.

(xxviii) Consideration should be given to accommodating abortion primarily in laws focusing not upon crime and punishment but upon health and welfare.

(xxix) A continuing dialogue should be maintained between doctors and lawyers on the impact of legislation upon medical practice, and the impact of medical technology upon the relevance and application of laws.

(xxx) National documentation of proposals for legislative

reform and copies of legislation enacted should be sent to the Commonwealth Secretariat, in order to ensure that other jurisdictions might benefit from collective experience in this difficult field.

(xxxi) Regional groups of countries should explore the possibility of regional collaboration to improve the legal availability of abortive services, to make means of fertility control more freely available, to determine the appropriate qualifications of paramedical personnel involved, and to clarify and, where necessary, reform relevant legislative provisions, including those concerning adolescents. The provision of a consultant, on request, to assist governments of the region in this connection, and to advise on how recommendations of the work-shop might be implemented, should be considered.

(xxxii) Regional groups should also promote the training and monitoring of appropriate health care providers, on a regional basis, in the light of the workshop's recommendations.

(xxxiii) The Secretariat should, where requested, assist in whatever way it can governments and regional groups seeking to implement recommendations of the workshop.

(xxxiv) The Secretariat should, from time to time, circulate to member governments documentation on proposals for legislative reform and copies of relevant national legislation. A periodic listing of relevant health legislation in the Commonwealth should also be made available, possibly by extracting references and citations from the Commonwealth Law Bulletin.

(xxxv) The Secretariat should seek to arrange further workshops and continue to promote discussion to improve understanding between doctors and lawyers on abortion, contraception, adolescent health care and associated matters.

Legislation on medicinal drugs

(xxxvi) Governments should consider establishing national and/or regional panels of experts to keep under constant review the technical aspects of drugs and the complex and multi-sectoral issues involved in their importation, use, distribution and quality control.

(xxxvii) Governments should consider providing opportunities for the medical and legal profession to exchange and review on a regular basis information on relevant issues, and to plan appropriate national and joint policies, and action on them.

(xxxviii) Those governments that have not yet signed the International Convention on Psychotropic Substances are urged to give favourable consideration to doing so.

(xxxix) The Secretariat should where possible assist member countries, on request, to convene regional meetings and discussion groups in relation to (xxxvi) and (xxxvii) above.

(xl) The Secretariat should continue to collate and distribute to

member countries, from time to time, information that might be of value to them in reviewing their national drug policies and relevant legislation.

(xli) The Secretariat should provide member countries, on request, with all possible technical, educational and training assistance in this connection.

Other medical-legal matters of concern

(xlii) The question of compensation for damage arising from a medical accident where there was no negligence should be given further study.

(xliii) The question of difficulties arising in some jurisdictions where professional men and women may be reluctant to give evidence or take action against their professional colleagues should be examined by medical and legal professional associations, so that any public concern which may exist may be removed.

(xliv) Rules of evidence should be kept constantly under review to see how far it is possible, consistent with the imperative needs of justice, for doctors to submit written reports of their conclusions to the courts, subject to the right of the parties to insist upon the appearance to give oral evidence and to be cross-examined.

(xlv) When doctors are summoned to court every effort should be made to ensure that they are away from their essential duties for as short a time as possible.

(xlvi) Whilst it is recognised that the granting of permission to set up "off-shore" medical schools is solely a matter for the sovereign governments concerned, everything possible should be done—nationally, regionally and internationally—to prevent establishment of medical training institutions whose facilities and teaching fall below recognised standards.

(xlvii) The medical-legal dialogue should be continued on a regional basis, and governments should consider setting up appropriate machinery to this end.

The conclusions reached by the Malaŵi workshop were—

Legislation on the use of paramedicals for community health care

(i) The concept of expanding the roles of paramedicals in providing health care, which involve such functions as simple diagnosis and treatment normally undertaken by doctors, was endorsed.

(ii) The use of paramedicals to perform such functions be encouraged, and that the cadres concerned be given further recognition.

(iii) Governments could usefully review the legal arrangements which affect the selection, training, authorisation, practice and

supervision of paramedical personnel, with a view to improving the delivery of health care services.

(iv) Such a review should seek to ensure that, where the duties of paramedicals are expected to include acts normally undertaken by doctors, the personnel are afforded adequate legal recognition and authorisation. This may mean that some existing laws and regulations will have to be changed.

(v) Where new paramedical cadres are created, or where it is found that existing cadres are functioning without appropriate legislative recognition, these personnel should be given legal status appropriate to their training and their functional roles.

(vi) The role which traditional (folk) practitioners play in the delivery of health care should be reviewed. Where appropriate, standards for their practice should be established, regulated and, if necessary, improved, and the creation of self-regulatory bodies should be encouraged. Folk practitioners should not simply be ignored by the health care establishment; active attempt to encourage their co-operation should be made.

(vii) Before any legislative or regulatory action is taken in relation to paramedicals, a dialogue should be established between the medical and legal authorities within the government, so as to achieve the best possible arrangements. Machinery should be created to ensure that this dialogue should be a continuing process.

(viii) At both national and regional level, the use of paramedicals should be made the subject of continuing study.

(ix) The role of paramedicals in health care delivery should be considered at national health meetings and also at regional meetings of Health Ministers, and that legal personnel should be invited to contribute to these discussions.

(x) The Commonwealth Secretariat should continue to act as a channel for information and documentation on both the medical and the legal aspects of the use of paramedicals in primary health care.

(xi) The Secretariat should continue to support efforts to establish a medical-legal dialogue on the use of paramedicals.

(xii) The Secretariat should provide Commonwealth governments, on request, with appropriate technical assistance in connection with programmes which seek to make fuller use of paramedical personnel.

Legislation on commercial advertising inimical to health

(xiii) Governments should consider establishing advertising review boards for the purpose of restricting misleading advertising and the promotion of products the use of which is detrimental to health.

(xiv) Governments should also explore the possibility of estab-

lishing codes of ethics or standards by legislation, for advertising and promotional activities relating to all products and particularly to those inimical to health.

(xv) Governments should consider promoting health education in every way possible, using all available means of public communication, to counteract the advertising and use of products detrimental to health.

(xvi) Efforts should be made on a regional basis to achieve uniformity in codes of ethics and standards established for advertising, and to promote inter-governmental and multi-disciplinary discussion of the problem and co-operative action.

The law on medical termination of pregnancy and related issues

(xvii) Present laws on the medical termination of pregnancy are often unclear, to the detriment of women's health. It was considered desirable for every jurisdiction to have at least a developed law, either by legislation or through an authoritative executive statement of the scope of lawful abortion under the existing law.

(xviii) Laws were found to fail to accommodate recent medical advances. It was considered that laws relating to approved contraceptive measures should be clearly exempted from the scope of laws relating to abortion.

(xix) It was thought that indications for lawful abortion should include, at the minimum, preservation of life and physical and mental health, as determined necessary in good faith by a doctor. These indications could cover a number of other, more specific indications, although the case for separate inclusion of these should be considered.

(xx) It was recommended that consideration should be given to accommodating abortion primarily in laws focusing not upon crime and punishment but upon health and welfare.

(xxi) Persons performing lawful abortion were considered to be best protected by a clear statement of the legality of procedures performed in good faith on medical (and specified non-medical) grounds.

(xxii) Qualifications of persons authorised to perform abortions and the facilities to be used should be determined with reference to prevailing local circumstances. Provisions should be flexible, offering the best possible health care in the circumstances and not insisting on standards unnecessarily made higher than those for other comparable medical procedures.

(xxiii) The study of why abortion procedures needed to be differentiated in law from other health-directed medical procedures was recommended.

(xxiv) Approval procedures for abortion, and also the scope of any third party veto, should be related to the woman's health

care needs in her prevailing circumstances, and should not prejudice her welfare.

(xxv) It was thought that too little was known by the authorities in many countries about the extent and the circumstances of abortion. It was therefore recommended that governments should arrange for the systematic gathering of relevant data.

(xxvi) In all cases of medical termination of pregnancy the woman should be given, or at least offered, the means of contraception and instruction as to use, where available and acceptable.

(xxvii) The Commonwealth Secretariat should encourage discussion of issues relating to the medical termination of pregnancy at meetings of Commonwealth Health and Law Ministers, and at regional and national level.

(xxviii) The Secretariat should continue to act as a channel for information and documentation on both the legal and the medical aspects of the medical termination of pregnancy.

(xxix) The Secretariat should continue to support efforts to establish a medical-legal dialogue on the subject.

(xxx) The Secretariat should, where possible, provide technical assistance to Commonwealth governments requesting help with the development of their laws on the medical termination of pregnancy.

Legislation on medicinal drugs

(xxxi) Each country should have a national formulary, based on the local disease pattern, and this formulary should be used as a basis for bulk purchase and quality control.

(xxxii) There should be a clear national policy, backed by appropriate legislation and regulations, on the importation of drugs, including imports for use by the private sector, based on local requirements and designed to keep costs down.

(xxxiii) Adoption of a limited list of drugs could be effective in reducing costs. Full information on the drugs listed should be made available to persons responsible for ordering them.

(xxxiv) Training curricula for doctors and other medical staff should include teaching on prescribing and the economics of drug purchase, and should place emphasis on treatment with the cheaper drugs.

(xxxv) A national policy on the control of advertising and all other forms of drug sales promotion was seen as essential. Close consultation between medical and legal authorities is needed in this connection.

(xxxvi) Steps should be taken to educate the public about the use and abuse of medicinal drugs. This process would be facilitated if a limited list of drugs was used.

(xxxvii) The organisation of medical stores is often unsatis-

factory and needs improvement, especially where stocks of commonly-used drugs are concerned. Close co-operation between doctors and pharmacists is essential and care should be taken to avoid excessive ordering. Adequate training for medical store staff is also required.

(xxxviii) In view of the various pieces of legislation dealing with drugs, medical and legal authorities should together examine what consolidation is required and should together initiate action to secure this.

(xxxix) Governments should provide the Commonwealth Secretariat with copies of recent legislation concerning medicinal drugs, for collating and distributing to other member countries.

(xl) Groups of neighbouring countries should create machinery to keep all aspects of the supply and use of drugs under constant review, and to promote practical co-operation on a regional basis. Legal, as well as medical and pharmaceutical, staff should be involved in this process.

(xli) Regional schemes for joint purchase, manufacture and quality control of drugs should be undertaken where practicable, in the interests of economy and the maintenance of drug standards. An appropriate mixture of manufacturing in the region and importation from outside could be worked out, and the required legal provisions made.

(xlii) The Commonwealth Secretariat should, where possible, assist member countries requesting help with the improvement of drug supplies and control, and should continue to encourage regional co-operation to this end.

(xliii) The Secretariat should continue to collate and distribute to member countries information, including copies of legislation, that may be of help to them in reviewing their national drug policies and legislation.

The Reports of both Meetings are available on application to the Medical Division, Commonwealth Secretariat, Marlborough House, Pall Mall, London SW1Y 5HX. They include the following papers—

- (a) Para-Medicals in primary health care: Medical-legal issues and alternatives, by Dr. Francis M. Shattock;
- (b) Legislation on commercial advertisers inimical to health, by Lorne E. Rozovsky; and
- (c) Law on medical termination of pregnancy, by Rebecca J. Cook and Bernard M. Dickens.

The following studies, published separately by the Commonwealth Secretariat, were also considered by the workshops—

- (a) The use of paramedicals for primary health care: a survey of medical-legal issues and alternatives, by John M. Paxman, Dr. Francis M. Shattock and Prof. N.R.E. Fendall (£3); and
- (b) Three studies of abortion laws in the Commonwealth: Develop-

ments in medical technologies for fertility regulations and their implications for medical legislation, by Mostyn P. Embrey; The law against family planning—a Commonwealth survey, by Victor Tunkel; and A survey of abortion laws in the Commonwealth, by Rebecca J. Cook and Bernard M. Dickens (£3).

Communiqué of 1980 Meeting of Commonwealth Law Ministers

1. The Meeting of Law Ministers of the Commonwealth opened at Sam Lord's Castle, Barbados, on 29 April 1980 with an inaugural address by the Chief Justice of Barbados, the Rt. Hon. Sir William Douglas, and concluded on 2 May 1980.

2. The Meeting was attended by Law Ministers, Attorneys-General, other Law Officers and officials from 41 countries, and elected as its Chairman, the Hon. Henry de B Forde, SC, Attorney-General and Minister of External Affairs for Barbados. Those participating on the first occasion since attaining their independence included Dominica, Kiribati, St. Lucia, St. Vincent and The Grenadines, and Solomon Islands. All were congratulated on their achievement of nationhood, and these joined in the special welcome which was extended to Zimbabwe as it took its place at the Commonwealth table for the first time.

3. Ministers expressed their very great indebtedness for the scholarly, perceptive and helpful papers prepared for the Meeting.

4. They reaffirmed their conviction that the Commonwealth association, committed as it is to guaranteeing the rights of all and to upholding the Rule of Law, and with its shared legal heritages, provides a firm foundation for the highest level of co-operation and mutual assistance in the legal field. This did not circumscribe participation in other international fora, in which Commonwealth members have traditionally played a role, nor did it limit the extension of co-operative arrangements to jurisdictions beyond the Commonwealth.

5. In the course of their deliberations, Ministers reviewed a number of areas in which special intra-Commonwealth arrangements have functioned well to the mutual advantage of the peoples of the Commonwealth, and considered ways in which existing levels of co-operation might be even further enhanced.

Recognition and Enforcement of Judgments, etc

6. The Meeting recognised that the ability to enforce judgments and certain other court orders, and to serve process, across

jurisdictional boundaries was of the greatest importance, particularly in times of ever increasing mobility and in the wake of the shifts of population that have taken place over the past 40 or so years. For

Human Tissue Transplants

22. A number of Commonwealth jurisdictions have, in recent years, sought to regulate the removal and use of different types of human tissue from both living and dead donors. Ministers recognised that sensitive moral, ethical, religious and legal issues were involved, and a variety of approaches was canvassed in their discussions.

23. Ministers considered it important that unsatisfactory procedures should not be permitted to develop. While a humanitarian approach to the problem was being pursued, they were also anxious to prevent any commercial exploitation of donors. They agreed to keep each other informed, through the Commonwealth Secretariat, of future developments in their jurisdictions, and supported the suggestion that the Secretariat consider organising a combined medico-legal workshop to further discuss the matter.

Miscellaneous

Some Notes

Australia

Organ Transplants

The Federal Attorney-General has referred the law relating to organ transplants to the Law Reform Commission for examination and report by June 1977.

Among the questions that the Commission has been asked to examine are whether —

- (i) legislation should be enacted to deal not only with removal of parts of the human body but also with the preservation and use of the whole body;
- (ii) the wishes of the deceased donor should be overridden by the person in possession of the body;
- (iii) provisions should be included to ascertain quickly if the deceased had authorized the removal of parts of his body; and
- (iv) certain relatives of the deceased should be able to object to the transplantation of organs from the deceased's body.

Mental health

The Third National Mental Health Nursing Congress was held in Sydney in September 1977. The four day Congress was attended by over 300 psychiatric nurses, psychiatrists, social workers and medical practitioners from Australia, New Zealand, New Guinea, India and Thailand.

In an address to the Congress entitled 'The Civil Rights of Mental Health Patients', the New South Wales Attorney-General said that the utmost care should be taken to ensure that the treatment of mental illness did not unduly override commonly accepted standards of individual liberty, particularly where involuntary patients were concerned.

The Attorney-General disagreed with the view of the State's Mental Health Act Review Committee that the forced administration of shock treatment to involuntary patients was justified provided certain safeguards were met, and stated that there should be more stringent legal checks and balances on the admission of involuntary patients into psychiatric hospitals.

Poverty

Various Reports prepared by the Commission of Inquiry in to Poverty have now been published.

The Commission was appointed in 1972 to—

- (i) determine the extent of poverty in Australia;
- (ii) to determine the extent and effectiveness of existing measures and services, and the responsibility of Federal, State and local governments in matters associated with poverty;
- (iii) ascertain the factors which cause poverty in Australia; and
- (iv) make recommendations on ways of reducing poverty.

The various Reports include studies on matters such as law and poverty in Australia, social-medical aspects of poverty, poverty in education, community welfare services, consumer views on welfare services and rented housing, food consumption patterns, long term unemployed persons under conditions of full employment, a model system of welfare service planning, poverty among Aboriginal families, the effectiveness of community aid centres, a survey of young workers, the problems of the aged, the utility of Australia's income security policies, and the welfare of migrants.

In relation to the Report on law and poverty in Australia, there are specific studies, conducted by Professor R. Sackville, Professor of Law at the University of New South Wales, on the legal needs of the poor, homeless people and the law, legal aid in Australia, migrants and the legal system, and poverty and residential landlord-tenant relationships.

Still to be published are studies relating to a number of other topics, including bail and social security, poverty and the legal profession in Victoria, debt recovery in Australia, poverty and mental illness, and consumer protection and the incidence of consumer problems.

Mandatory reporting of child abuse

According to the Chairman of the Australian Law Reform Commission the claim that legislation compelling the reporting of cases of child abuse deterred parents from seeking help had not been proved. The Chairman said that he was aware that the Victorian Government had decided not to introduce a system of compulsory reporting (see page 1152 of this issue), as other Australian States had. However, he added that, "The claim that compulsory reporting legislation deters parents from seeking medical help has never been established by statistical information. There is no doubt that compulsory reporting is no panacea for the problem of child abuse. But no problem of this kind can be tackled if its variety, incidence and frequency are all but unknown."

The Chairman, who was addressing a La Trobe University Seminar on Child Welfare Law Reform, said that it was difficult to

estimate the national incidence of child abuse because of the shocking state of crime statistics.

He said that all American States had laws of varying scope and impact which required physical abuse of children to be reported. "The consequence of this legislation has been, at the very least, a better appreciation of the size and difficulties of the problem and the proliferation of a number of novel experiments in child abuse facilities", he said.

The Chairman said that the Australian Law Reform Commission was planning procedures for compulsory reporting in the Australian Capital Territory.

Drugs

The Australian Government has appointed Mr. Justice Williams, a Judge of the Supreme Court of Queensland, to act as a Royal Commissioner in a national inquiry into the use, etc., of drugs in Australia.

All state Governments, except those of New South Wales and South Australia which are holding their own inquiries into drugs, have agreed to support the national inquiry.

The Royal Commission's terms of reference are as follows—

- (i) the extent of, and the methods used in
 - (a) the illegal importation of drugs,
 - (b) the illegal exportation of drugs,
 - (c) the illegal production of drugs,
 - (d) the illegal trafficking in drugs;
- (ii) the places where drugs mentioned in paragraph (i) are produced or from which they are obtained and the places to which they are sent;
- (iii) the extent to which
 - (a) drugs are illegally used,
 - (b) drugs lawfully obtained are diverted to illegal trafficking or illegal uses,
 - (c) drugs are misused in so far as such misuse is relevant to the illegal use of drugs;
- (iv) the extent (if any) to which the illegal activities mentioned in paragraph (i) or the illegal use or the diversion mentioned in paragraph (iii) are engaged in, directly or indirectly, by persons who engage, on an organised basis, in other illegal activities, whether or not related to drugs;
- (v) the adequacy of existing laws (including the appropriateness of the penalties) and of existing law enforcement (including arrangements for co-operation between law enforcement agencies) in relation to the prohibition, restriction or control of the importation, exportation, production, possession, supply or use of, or trafficking in, drugs;

- (vi) whether new law should be enacted or other measures taken (including the taking of initiatives for the making or revision of international agreements) to remedy any inadequacies found to exist under paragraph (iii).

Interpretative provisions—

- (vii) the expression “drug” means a narcotic or psychotropic substance and includes every drug or substance specified in any of the schedules to the single convention on narcotic drugs or the convention on psychotropic substances;
- (viii) a reference to a drug includes a reference to an article or substance containing a drug;
- (ix) a reference to the production of a drug includes a reference to the manufacture of a drug by any means and also includes a reference to the cultivation or production of any plant substance from which a drug is capable of being derived;
- (x) a reference to the importation or exportation of, or to trafficking in, a drug includes a reference to the importation or exportation of, or to trafficking in, a plant or substance referred to in paragraph (ix) or of a seed from which such a plant can be cultivated.

Direction to Commissioner—

To the extent that alcohol may be regarded as a narcotic substance, the commissioner is to be directed to have regard to it only in so far as it is necessary to do so for the purpose of establishing the extent of the illegal use, or of the misuse, of other drugs in accordance with paragraph (iii).

Combatting illicit drugs

At the hearings of the Federal Royal Commission into Drugs evidence has been given before the Royal Commissioner, a Judge of the Supreme Court of Queensland, that has caused him to conclude that one person in Sydney is controlling the whole of the trafficking of heroin throughout Australia.

Senior police officers giving evidence before the Royal Commission have stated that the importation and trafficking of heroin in Australia is on the increase, and they called for powers to enable them to institute border checks of vehicles travelling between the Australian states, as well as increased powers of search, including telephone tapping.

The Federal Minister for Business and Consumer Affairs has visited four South East Asian countries to meet with politicians and government officials in order that he might obtain more information on the role such countries are playing in attempting to control the trafficking in hard drugs.

Following the Minister's visit, a second Australian narcotics bureau has been opened in South East Asia, thus giving Australia

one bureau in Malaysia and another in Thailand.

The Minister stated that he was impressed with the development of Thailand's law enforcement agency, and the methods the agency was employing, and with that country's determination to reduce the production of opium.

Drug abuse

A Report on the extent and nature of the inappropriate use of alcohol, tobacco, analgesics and cannabis has been prepared by the Senate Standing Committee on Social Welfare.

When tabled in Parliament, it was stated that this Report would make a significant contribution to one of the most important debates now taking place in Australia. This is the first, national, parliamentary report into the use and abuse of alcohol and tobacco in Australia, and the first attempt to state a national strategy for coping with drug abuse.

The Committee's Report notes that Australians are compulsive and heavy drug users, and have always been so. National tradition has lent towards intoxication, rather than towards sobriety.

A total of 84 recommendations were made in the Report, many of which are highly controversial. Among these are the recommendations that —

- (i) personal use of marihuana be decriminalised;
- (ii) that all analgesics carry an appropriate cautionary warning on their containers;
- (iii) that a total ban be placed on the advertising of tobacco products in all areas under the Australian Government's control; and
- (iv) that the Government ban the advertising of alcoholic beverages.

Use of Drugs and Crime

The Australian Institute of Criminology is to conduct an inquiry into the connection between the use of drugs and the incidence of violent crime in Australia.

The Federal Treasurer told Federal Parliament that the Federal Taxation Department will be asked to supply the New South Wales Royal Commission into Drugs with details of the income of persons suspected of being involved in drug trafficking. The Treasurer added, however, that it would be up to the discretion of the Commissioner of Taxation whether such information would be furnished, and there could be no question of the Commissioner being ordered to supply the information involved.

Drug use and crime

Between 30 and 40 per cent of the money spent on illegal drugs in Australia is derived from crime other than drug offences, according to a Report "Drug Use and Crime", issued by the Australian Institute of Criminology. The offences referred to included property crimes, gambling offences and prostitution.

The Report bases its findings on a study of the criminal histories of 1,000 Australians convicted of drug offences, and states that estimates of the amount of drug-related crime in Australia should be treated with caution. It finds that drug-related criminal behaviour is particularly influenced by social and economic factors. For most narcotic addicts, criminal behaviour preceded addiction.

A significant number of narcotic addicts commit crimes to support their habits. Of these crimes, the majority involve property offences of goods which can be sold to derive money for the purchase of drugs. There was an increasing tendency, however, for addicts to indulge in crimes against persons to obtain money directly, as the risk of arrest and conviction for drug-related criminal activity is very low.

The Report says that, although the conclusions are largely based on American data, there is no reason to suggest that the same is not also true for Australia. Comparing these conclusions with the study of Australian offenders, the Report says the population of narcotic users is composed of individuals with "widely varying habit sizes and frequencies," implying that aggregate estimates of habit sizes, and analyses based thereon, may be inappropriate.

A significant percentage (probably between 30 per cent and 50 per cent) of the income needed to support large habits is generated within the drug distribution network itself (that is, by buying and selling illegal drugs).

The Report found that, although those convicted of cannabis offences came largely from the same group as those who committed narcotics offences, fewer cannabis offenders had criminal backgrounds.

The Report recommends that –

- (i) the Police Commissioners establish and maintain a "heroin-user crime index";
- (ii) an intensive study of the heroin distribution system, preferably in Sydney, should be made; and
- (iii) the Commissioners take the initiative in analysing drug policies, with a view to setting realistic goals for drug enforcement.

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- (iii) a total ban be placed on the advertising of tobacco products in all areas under the Government's control; and
- (iv) the Australian Government ban the advertising of alcoholic beverages.

Dangerous drugs

The Federal Minister for Business and Consumer Affairs has announced Cabinet approval of legislation imposing harsher penalties for the offence of trafficking in narcotics and other dangerous drugs.

It is proposed that the penalties for drug offences involving the illegal importation or export and possession of the relevant drugs will be increased to a maximum fine of \$A100,000 or 25 years' imprisonment.

The only drug excluded from the increased penalties will be cannabis, in leaf form. The penalty for possessing this drug will remain at a \$A4000 fine and 10 years' imprisonment, or a \$A4000 fine or 10 years' imprisonment.

Abortion debate revives

Members of Parliament are reported to be sharply divided over measures which have been introduced to amend abortion legislation enacted as recently as last December [noted at (1978) 4 C.L.B. 239]. A petition signed by more than 250,000 electors (about 20 per cent of the electorate) has also been presented, calling for total repeal.

Many women are now flying to Australia to obtain legal abortions there.

Some see the issue as becoming a dominant one in the General Elections scheduled for November, despite the MPs' voting on a "conscience" and not on a party basis.

Pornography

The respective Australian State and Federal Governments have agreed to place tighter controls on the publication of materials depicting paedophilia and sadism.

The various ministers whose portfolios cover censorship are to discuss the matter at another meeting.

Social services and the family

The federal Department of Social Security has published a Report on families and social services in Australia.

The 581-page Report is in two parts: Volume I contains the foreword and summary of recommendations and six chapters covering the introduction and the information concerning the current and future structural forms the family takes in Australian Society; Volume 2 contains the analysis of the Committee's work explained in Volume I, and appendices relating to much of the information collected.

The Report examines the services that are directed, or should be directed, to assisting the social functioning of individuals and groups of individuals in families concerned with the child rearing process.

The Report does not canvass services the objectives and nature of which are primarily related to such matters as education, housing, adult corrections, health, and recreation.

Special appendices deal with income security and housing policy as they affect families. Also covered are the range of personal social services affecting many different types of employed personnel, administrative systems, public financing and legislative or statutory bases. The personal social services include —

- (i) all those services that assist disadvantaged groups, such as the disabled, handicapped and retarded, to live as normally as possible;
- (ii) the services that assist the day to day social functioning of the aged, children and families: the services that facilitate and support the involvement and participation of people in their communities and in society;
- (iii) the services that enhance and maintain employability; and
- (iv) the linkage and referral services that join people with services and thereby assist in meeting individual and community needs.

Genetic engineering

A Professor at the Australian National University's School of Medical Research, who is also the Chairman of a Committee established by the Australian Academy of Science to monitor world-wide developments in genetic engineering, has advised Members of Federal Parliament that he is not convinced that there is a need for any legislation on genetic engineering in Australia and that, if introduced, such legislation could become inflexible because science was changing and scientific techniques developing so rapidly.

Report of the Australian Royal Commission on Human Relationships

The Royal Commission on Human Relationships was established by the Australian Federal Parliament after an unsuccessful attempt in 1973 to pass a private member's Bill to liberalise abortion laws in Australian Federal Territories. The motion to establish the Commission (approved on a free vote by 85 votes to 11) encompassed broad terms of reference, the aim of which was to "enquire into and report upon the family, social, educational, legal and sexual aspects of male and female relationships" insofar as they could be improved by Government funding and facilities. The three Commissioners—Justice Elizabeth Evatt, Chief Judge of the Family Court of Australia, Dr. Felix Arnott, Anglican Archbishop of Brisbane and Anne Deveson, broadcaster and journalist—began their work in 1974 and were expected to produce a report by mid-1978. Their funding was cut in 1976 (a decision criticised by the Commissioners) and the Report was finalised and released in November 1977.

The three years' investigation by the Commission has produced one of the most comprehensive studies of social issues in Australia's history. Its conclusions are based on 1,264 written submissions, oral evidence at public hearings by 374 people, informal discussions and research done by and for the Commission. Every individual or organisation with expert knowledge or point of view relevant to the enquiry was consulted or given an opportunity to contribute, and the list of submissions shows that a wide range of views was represented. The Report is in seven parts, printed in five volumes and includes 511 unanimous recommendations covering the broad areas of education in human relationships; health and medical education; sexuality and fertility; the family; equality and discrimination; and rape and other sexual offences.

The Commissioners point out that the enquiry itself is a product of profound personal and social changes in the area of male and female relationships—changes which have occurred at a pace "previously unparalleled in human history". They saw their task as exploring these changes and making recommendations which would be an aid to understanding and assist institutions to reflect the reality and meet the needs of contemporary Australian society. The constraints of space preclude the possibility of dealing with all the recommendations or even subject headings (52 topics are listed in the table of contents), so the reaction of the community has been used as a guide in selecting specific recommendations for comment.

The Commission's findings that young people are ill-prepared to deal with the pressures of a rapidly changing society; that there is insufficient support for the family structure when it is over-stressed and a paucity of social planning in areas affecting the family; that the changing roles of men and women in the family and society are inadequately dealt with in education programmes; that inequality and discrimination still exist in relation to sex, marital status, ethnic

background, minority groups and education; that the needs of groups such as the handicapped, migrants, solo parents and Aborigines are inadequately met; that the training of professionals dealing with human relationships problems is deficient; and that there is an urgent need for social and legislative changes to remedy these problems have received widespread community support and praise from political and church leaders. However, recommendations resulting from the Commissions' belief that "the law should not be the arbiter of moral values" and that ignorance about sexuality and fertility control should be rectified by education programmes and by information being freely available, have provoked strong criticisms from some sections of the community. The recommendations which have proved contentious are the lowering of the age of consent to sexual intercourse to 15; the encouragement of the free display and advertising of contraceptives; the availability of contraceptives and abortion to girls of 14 and over without parental consent; the availability of abortions up to the 22nd week of pregnancy at the request of the woman, or later if mental or physical abnormality is probable; the decriminalisation of homosexuality and the teaching of acceptance of it in schools; the decriminalisation of incest between consenting couples over 17; the decriminalisation of prostitution and brothels; the abolition of the offence of rape and its replacement with appropriate assault charges; and the removal of criminal sanctions against teachers where intercourse occurs with a student of 17 years or over.

While recognising that many people have sincere moral objections to many of these proposals, it is regrettable that the response of some public figures and of some sections of the media has not been conducive to rational debate. The controversial recommendations were leaked during an election campaign and what one newspaper described as "cheap political point-scoring" followed. Press statements describing the Report as "horrific", "appalling", "abominable" and "fairly revolting" were issued, and many newspapers responded by labelling the Report as 'The Sex Report'. The community's reaction, as evidenced by letters and public comments, ranged from describing the Report as "an extravaganza of licence" to "the most important social document ever produced in Australia".

In summarising the ramifications and examining the likely implementation of the Report, the unfortunate nature and timing of its release are seen as inhibiting reasoned discussion in both the community and parliament. It was to be expected that an enquiry into such delicate and morally sensitive areas of human behaviour would produce some controversial conclusions, but in a calmer, non-election atmosphere it is hoped that they will be reconsidered in the context of the whole Report. With perception and enlightened judgment the Commissioners have framed recommendations to

protect the individual and the family, and the social and legal implications of their finding may have a significant effect on the course taken by Australian society for decades to come.

It is probable that considerable time will pass before parts of the Report are implemented, but the serious social issues raised merit study by all sections of the community. Despite the wide parameters of the Report, the mass of data contained within it, and the number of recommendations finally made, the essence of the Royal Commission on Human Relationships is best captured by the Commissioners' own statement that "throughout the enquiry we have been guided by a belief in the right and integrity of the individual to make free choices in the context of human relationships, and to have access to the knowledge and skills which give such a free choice meaning".

Lesley Vick

Mental health

The Chairman of the Australian Law Reform Commission has called for legislation to prevent people being wrongly committed to mental hospitals. He said that existing laws in this area were outdated and failed to protect people from arbitrary and "oppressive" commitment.

Delivering the 20th Barton Pope Lecture for the South Australian Association for Mental Health, Mr. Justice Kirby said that the law should be brought into line with medical and social developments. He said that mental illness was rarely defined, even in psychiatric textbooks.

"The apparent faith in psychiatry is not always borne out by the results of psychiatric treatment", he said. "Many psychiatrists would surely agree with this. Within psychiatry there are differing, and sometimes competing, conflicting schools of thought. Without specific criteria and a real prospect of useful curative treatment, commitment to a mental hospital in a particular case may be oppressive and even arbitrary. There is no doubt that the mentally ill and intellectually handicapped suffer additional disadvantages in the state of our law," he said. "It is my hope that lawyers, law-makers and law reformers will play their part to improve this situation."

Mr. Justice Kirby said patients disputing mental ill-health should have compulsory, free, legal representation. "This is not a matter of forcing lawyers and other representatives on confused, disturbed, or dangerous mental patients", he said. "It is a matter of providing checks against the needless loss of freedom by people whose conduct, though it may be unusual, does not typically endanger themselves or society."

He also called for decriminalisation of suicide in all States (this has been done in Victoria) and said that the survivor of a suicide pact in which the other person had died should not be guilty of murder, but guilty of the lesser crime of manslaughter. There should be a specific offence of inciting or aiding a suicide or attempted suicide, he said. Proper support facilities should be provided for people who survived a suicide attempt.

Mr. Justice Kirby also called for—

- (i) attention to the separate and special problems of intellectually handicapped people;

- (ii) facilities for mental health problems created by drugs of addiction;
- (iii) a review of the rights of people held “at the Governor’s pleasure”;
- (iv) automatic review of the status of involuntary patients in mental hospitals;
- (v) a reduction in the number of patients in mental hospitals; and
- (vi) a reduction in the average period of a mental patients’ period of compulsory commitment before it was reviewed.

He said that it was important to recognise that the system of involuntary admission to a mental hospital was second only to the criminal justice system in the impact it could have on the civil rights of the individual. “Imagine what an outcry there would be if a person were sentenced to imprisonment in Australia without a trial, or for a generalised purpose such as the protection of others,” he said. He also quoted New South Wales’ figures which estimated that over half those admitted to Sydney’s Callan Park Hospital were not suffering mental illness “in any strict interpretation of that term”.

He believed that the grounds for involuntary commitment needed to be more clearly specified. Between 25 and 30 per cent of admissions to Australian mental hospitals were by involuntary patients—about 15,000 people each year. The law should question closely the sending of people to mental institutions as it did the sending of people to prisons, he said: “What we are dealing with is the personal freedom and individual liberty of a large and probably growing section of the community. One can see the problem in better perspective if it is remembered that, on average, the number confined in Australian prisons at any time is in the order of 10,000 people.”

Suicide and mental health

The Chairman of the Australian Law Reform Commission has recommended that the crime of suicide, though rarely prosecuted, should be abolished. He said that if there was a real risk of prosecution, the depression of the attempted suicide might be intensified and could provide a basis for further attempts.

He also recommended that the survivor of a suicide pact who had killed the deceased party should be guilty of manslaughter, and not, as at present, of murder. Instead there should be a specific offence of inciting, counselling, aiding and abetting the suicide or the attempted suicide of another.

Delivering the 20th Barton Pope Lecture to the South Australian Association of Mental Health, the Chairman said that mental-health laws needed to be reformed to keep pace with medical and social developments. “More than 60,000 people enter Australian mental hospitals every year”, he said, “Between 25 and 30 per cent of this number are committed as involuntary patients”.

He recognised that a person suffering from mental illness might also suffer social harm in the nature of embarrassment or ridicule, or in the nature of lost employment prospects, or even harm of a financial nature for himself or his family. However, while in some cases it might be appropriate to make attempts to persuade such a person to accept voluntary treatment, harm of a social, moral or financial nature should not justify detention without consent.

The Chairman predicted that mental-health law reform would involve measures to provide effective scrutiny of medical decisions to commit unwilling people to mental hospitals and a stricter definition of the criteria justifying involuntary commitment. In this regard, he said that there should also be legal provisions and other representation to mental patients, automatic review of the status of involuntary patients in mental hospitals, and a reduction in the average period of compulsory commitment before review.

He said that institutions were “frequently oppressive to the individual, destructive of self-reliance and sometimes brutalising both to the institutionalised and those who guard them. In the criminal justice area, it is recognised that some, including some mentally ill persons convicted of criminal offences, must be confined under close scrutiny. But the search is now commenced to find, for many who do not require such oppressive treatment, control which will be less costly and which will help to instil greater self-control and appreciation of the obligations that attend living in a modern independent community”.

Australia — A.C.T.

Public Health

The Australian Capital Territory Health Commission is in the course of preparing new, comprehensive, food laws for the Territory.

The laws, which are based on standards recommended by the National Health and Medical Research Council for incorporation in Australian State and Territory legislation, will apply to the purity of food and to the preparation and sale of food in the Territory.

Abortion

The Australian Government has rejected the recommendation of the Australian Capital Territory's Legislative Assembly that a free-standing abortion clinic should be built within hospital grounds and administered by the Territory's Health Commission.

The Government has also declined to accept the Assembly's recommendation that the Government incorporate the ruling of Mr Justice Menhennitt of the Supreme Court of Victoria (which enabled an abortion to be performed if medical practitioners considered the woman's mental or physical health to be in jeopardy) into the Territory's law relating to abortions. Instead of accepting the Assembly's recommendation for a permanent Termination of Pregnancy Ordinance for the Territory, the Government has extended indefinitely its present ban on private abortion clinics.

The Assembly's recommendations to the Government arose out of a 103-page Report to the Assembly by the Assembly's Standing Committee on Education and Health which recommended 45 proposals for abortion law reform in the Territory.

Mental Health Advisory Committee

Two members of community groups will have places on an eight-man advisory committee on mental health which has been recommended by the Australian Capital Territory Health Commission.

The Commission approved a recommendation by its Legislation Committee that provision be made in the proposed Mental Health Ordinance for such an advisory committee.

The membership of the committee would consist of the Commissioner or his nominee, the Director of Mental Health or his nominee and six other people nominated by the Commissioner and include a health administrator, a doctor, a clinical psychologist, a social worker and two members of community groups or agencies working in the field.

One of the Committee's duties will be to advise the Commission on standards of care and treatment of people with mental dysfunction so as to ensure the preservation of their human rights.

The Commission also approved a recommendation that the treatment of alcoholics and drug dependents be removed from the scope of the proposed Ordinance.

The recommendation also said that after the introduction of the Mental Health Ordinance, new legislation to cover alcoholics and drug dependents would be a matter for consideration.

Australia – New South Wales

Drug trafficking

The Royal Commission of Inquiry into Drug Trafficking appointed by the New South Wales Government is calling for public submissions on its third term of reference.

The terms of reference of the Royal Commission, are now as follows –

- (i) the cultivation, production, manufacture, distribution, supply, possession and use of
 - (a) drugs that are, for time being, drugs of addiction or prohibited drugs within the meaning of the Poisons Act, 1966 (N.S.W.),
 - (b) other drugs (other than tobacco and alcohol) that are drugs of dependence or of dependence potential;
- (ii) the identity of persons involved in
 - (a) the cultivation, production, manufacture, distribution or supply, where contrary to the laws of the State, of drugs of the kinds referred to in paragraph (i), or in the possession or use by others when contrary to those laws, of those drugs, or
 - (b) illegal or improper activities in connection with the matters referred to in sub-paragraph (a); and
- (iii) whether, in the light of the findings of the Commission on the above matters, changes are desirable in

- (a) the manner in which the laws of the State relating to the possession and use, cultivation, production, manufacture, distribution and supply of drugs of the kinds referred to in paragraph (i) are administered by the authorities of the State, whether acting alone or in co-operation with the authorities of other States or the Commonwealth, or
- (b) those laws referred to in sub-paragraph (a).

Child abuse

The New South Wales Child Life Protection Unit, established under the Child Welfare (Amendment) Act 1977 (N.S.W.), has reported a 500 per cent increase in the incidence of child abuse in the State [see also (1979) 5 C.L.B. 445].

Under the amending Act medical practitioners are protected from civil litigation if they report incidence of child abuse, as are members of the public acting in good faith.

The State's Department of Youth and Community Services, which administers the Act, has stated that there is a growing trend for self-referral in cases where parents who are abusing, or on the point of abusing, the children contact the Unit themselves.

Patients' rights

The Medical Consumers' Association of New South Wales has drafted a Patients' Bill of Rights. One of the main features of the Bill is a provision that would give patients the right to have information on matters relating to their health and medical treatment stated in plain language. Other provisions in the Bill would—

- (i) enable a patient to, in effect, make a "living will" stating what they would like to be done to them if they became unconscious;
- (ii) give a patient a right to seek alternative means of health care and treatment, such as acupuncture, herbalism, hypnotherapy and naturopathy;
- (iii) entitle a patient to refuse any specific treatment, drug, examination or other health care procedures; and
- (iv) provide a patient with a right of access to his medical records.

Copies of the Bill have been sent to all hospitals in New South Wales and to the State and Federal Attorneys-General.

Hazardous children's toys

The New South Wales Minister for Consumer Affairs has introduced regulations that enable the State's authorities to ban the sale of toys in the State which are found to be hazardous by the State's Products Safety Committee.

Child abuse

The New South Wales Minister for Youth and Community Services has introduced a Bill to amend the State's Child Welfare Act to make it compulsory for medical practitioners and other persons having a professional contact with a child to notify the Director of the Department of Youth and Community Services of any cases of the child being abused.

Under the legislation, parents who leave small children alone in motor vehicles for an "unreasonable length of time" will be liable to fines of between \$A200 and \$A1000.

Marihuana

The Attorney-General for New South Wales is to introduce legislation into the New South Wales Parliament to amend the State's present laws against the use or possession of marihuana.

The proposed amendments will, if enacted, mean that anyone arrested for smoking or possessing small quantities of the drug will be subject only to a minor fine and not to imprisonment. However, the amendments will not apply to persons charged with selling marihuana or with having amounts considered to be excessive for personal use.

At present, the law provides for a maximum penalty for possessing or using marihuana of a fine of \$A2000 and two years' hard labour. However, statistics show that magistrates are imposing fines of between \$A60 and \$A80, and not imprisoning offenders.

The Attorney-General stated that it was his personal view that persons who smoked marihuana should not be sent to prison, as the effects of the drug were shown by medical evidence to be less harmful than the consumption of alcohol and tobacco.

Victimless crimes

A special committee has recommended to the New South Wales Government sweeping changes to the law regarding drunkenness, vagrancy and prostitution. The committee has recommended the repeal of prison sentences for prostitution and vagrancy. Drunkenness, it said should no longer be an offence. It recommends that police be able to take a person suspected of being drunk before a court, which could admonish him or require him to undertake medical treatment. The courts could require vagrants to attend rehabilitation centres for up to one month for appropriate treatment. The committee recommends that the fine for prostitution be reduced from A\$400 to A\$200 and that the six months' gaol sentence be abolished.

Rights of the mentally ill

The Institute of Criminology at Sydney University has conducted a Seminar on the Rights of the Mentally Ill at which, inter alia, the rights of mental patients to such things as legal representation was discussed by lawyers, doctors, psychiatrists and welfare workers.

Consumer protection

The New South Wales Government has introduced a Bill to make it illegal for retailers of bread in the State to return any bread which they are unable to sell to the bread's manufacturers.

The New South Wales Government has also introduced a Bill that requires many perishable products which are likely to perish after a period of three months to two years, such as chewing gum, peanuts, chocolate, cosmetics, biscuits and cereals, to carry a plainly expressed, and prominently displayed, date of manufacture on their labels. The State's Minister for Consumer Affairs has announced that, after the Bill is enacted, manufacturers will have one year to ensure that their products comply with the new law. The State's Minister for Health is preparing similar legislation that will apply to food which perishes more quickly, such as milk, bread and eggs.

Psychosurgery

The New South Wales State Government is considering the Report of an inquiry panel that was appointed to investigate psychosurgery techniques at the State's leading psychiatric hospital.

The panel recommended that all future cases of psychosurgery be referred to a special board for approval. This board, comprising medical experts, lawyers and private citizens, would require proof that the patient had given "informed consent" before an operation involving psychosurgical techniques could be performed.

"Informed consent" would be based on evidence of the patient's capacity to make a rational decision and proof that his own medical practitioner had detailed the procedure and any associated risks. The inquiry felt that no person who refused such operations should ever have an operation performed on him against his will unless a Judge of the Supreme Court found the patient to be incapable of making a rational decision. In such a case the Judge could authorise the operation if it was proved to his satisfaction, on medical evidence, that the operation was required to relieve "severe and intractable suffering".

Medical practitioners

The New South Wales Attorney-General has appointed a committee, under the chairmanship of the Chief Justice of the Supreme Court, to investigate the difficulties medical practitioners have in giving evidence in court proceedings.

Licensing of hostels

The New South Wales Government is investigating the licensing of hostels and boarding houses with a view to increasing their social status and well-being. The Government's decision arose out of the Report of the Federal Government's Commission on Poverty which found that many people who were discharged from psychiatric hospitals lived on or below the poverty line.

The State Minister of Health also stated that the State Health Commission was already reviewing the operation of the State Mental Health Act 1958, including its sociological aspects.

Chiropracty

The New South Wales Minister for Health has announced that he will introduce legislation later this year to require all persons practising manipulative therapy in the State to be registered.

Consumer protection

The Department of Consumer Affairs is conducting an investigation into the pest exterminator firms operating in the State.

Victimless crime

The New South Wales Government has sponsored an international seminar on "victimless" crime.

The seminar, which was opened by the State's Premier, is being used as a basis for assisting the State Government to prepare legislation to decriminalise many victimless crimes.

Child neglect and abuse

A New South Wales senior pediatrician has stated that there is a reluctance on the part of Australian doctors to diagnose and report instances of child abuse and that they helped to hide the extent of the problem. The pediatrician was speaking at a conference held at Sydney in September 1980 on child neglect and abuse that was jointly sponsored by the State Department of Youth and Community Services and Kuring-gai College of Advanced Education. The senior pediatrician told the conference that the medical profession had a significant responsibility to the community in the prevention of child abuse. However, this responsibility was sometimes neglected because of the unwillingness or the inability of practitioners to recognise the symptoms of the abuse or the potential child abuse in parents.

The "baby-bashing syndrome" had not been publicly acknowledged until 1962, he said, and, because of this late recognition, Australian medical schools had not developed adequate teaching in this area. Practitioners frequently did not diagnose or report cases of child abuse because they feared becoming involved in subsequent legal proceedings. He said that legislation had been introduced into New South Wales in 1977 making it compulsory to report cases of child abuse, and that in every year since 1977 about 850 cases had been reported by private prac-

titioners; only 2.9 per cent of these cases had been reported by private practitioners.

A former President of the Council for Civil Liberties described to the conference the difficulties experienced by advocates appearing for children at the Childrens' Courts on complaints of neglect or abuse. She said that it was essential that advocates have sufficient access to independent researchers to enable them to put impartial cases to the courts.

Children born through artificial insemination

In July 1980 the Attorney-General for New South Wales announced that the Standing Committee of Australian Attorneys-General has agreed on a proposal to ensure full legal status for children born through artificial insemination donor sperm.

The Attorney-General said that it was estimated that at present there were about 10,000 children in Australia already born or about to be born as the result of artificial insemination by the sperm of a donor. He added: "At law these innocent children suffer grievous handicaps because they cannot be regarded as legitimate. Such children suffered legal disabilities mainly when it came to inheritance and maintenance. The very real danger is that in a contest over inheriting property of their sociological father (the husband of their mother at the time of their birth) these children will come off second best compared to any legitimate children or other beneficiaries. Similar problems threaten in the area of claims for maintenance from the sociological father."

The Attorney-General said that the Standing Committee had also agreed to recommend to their respective governments that they introduce legislation to provide that a husband who consents to his wife having artificial insemination shall be deemed to be the father of the resulting child. The Standing Committee had also agreed to recommend that provision be made that a sperm donor shall have no rights or liabilities in respect of any child conceived through use of his semen, and that any child so conceived shall have no rights in respect of its donor father.

Australia— Queensland

Child bashing

The Minister for Health for Queensland has announced that he will be introducing a Bill to amend the State's Health Acts 1937-1952 so as to require the State's medical practitioners to report cases of child bashing or suspected child abuse to the State's Director-General of Health and Medical Services.

Organ transplants

Draft legislation to permit organ transplants to take place in Queensland was discussed at the Australian Health Ministers' Conference held at Brisbane in June 1979.

The Queensland Minister for Health said that the Conference would hear about the draft of the Human Tissue Transplant Bill in Queensland.

He said it was against the law under the Criminal Code of

Queensland now for an organ, such as a kidney, to be donated by a living person for transplant purposes. The draft legislation would cover donations by living and dead people, and this would significantly increase the number of kidneys available for people presently on dialysis machines.

Ministers of Health from all States and the Federal Minister of Health attended the Conference with their senior advisers from 27 to 29 June.

Other topics that were discussed included the Harrisburg nuclear accident, Indo-Chinese refugee health schemes, the drafting of a Model Food Act covering packaging and handling, and uniform controls over electro-medical equipment. The Queensland Minister for Health said that large amounts of new electronic medical equipment were now available. Uniform legislation was needed to evaluate these machines before they could be used.

Child abuse

Special anti-child abuse teams will be established in 33 centres throughout Queensland.

The teams have been formed following the passing of special anti-child-abuse laws by the State Government, which makes it compulsory for doctors to report child-abuse cases.

The State's Minister for Health stated that three basic members of the team would be a doctor, a policeman and a Children's Services Child Care officer. He said that the teams would be established in 15 major centres in the State, and that there would also be teams in 18 regional centres.

The Minister said that although the incidence of child abuse in Queensland is not known, the State Government was concerned by the apparent extent of the problem and the complexity of handling it.

The new legislation made it mandatory for medical practitioners to notify the Director-General of Health and Medical Services of an instance where they suspect a child has been abused or neglected.

He stated that "child abuse" is any act or omission which endangers or impairs a child's physical or emotional health and development, and included physical abuse and corporal punishment, emotional abuse, physical neglect and inadequate supervision, emotional deprivation, sexual abuse and exploitation.

Australia— South Australia

Non-medical use of drugs

A research paper tendered in evidence to the South Australian Royal Commission into the Non-medical Use of Drugs has concluded that the maximum penalties in many cases were unrealistic in relation to the harm actually caused by the drugs, and calls for a reclassification of all drug offences and penalties.

The paper, written by a law lecturer at the South Australian Institute of Technology and a research officer attached to the Royal Commission, examined in detail the principles and statistics of drug prosecutions and sentencing in South Australia between June 1974 and June 1977.

The authors of the paper concluded, *inter alia*, that—

- (i) more than 93 per cent of drug offences prosecuted in the first half of 1977 involved the use of cannabis and only a small number involved the use of heroin;
- (ii) judges and magistrates increasingly relied on the imposition of fines rather than on prison sentences to discourage drug use, and approximately half the number of persons convicted for the illegal use of cannabis were fined only;
- (iii) South Australian courts differed from those in other Australian States in taking into consideration the type of drug involved, the amount of drug used, the motives of the trafficking in and using drugs, and other circumstances;
- (iv) the State's judges and magistrates were aware of the effects of different drugs, and tended to impose more lenient sentences on offenders using less harmful drugs; and
- (v) between 80 – 85 per cent of people charged with drug offences in the State were convicted.

The authors also questioned the view that the users of cannabis must be severely penalised because otherwise they might progress to using opiates. They considered that it could not be assumed that most users of cannabis came into contact with dealers in hard drugs, since many of them obtained the drugs from their friends.

Sport Insurance

The South Australian Minister for Labour and Industry has tabled a Report recommending the establishment of an insurance scheme to cover sportsmen and sportswomen against injury.

Under the proposed scheme, which would cover some 250,000 sportsmen and sportswomen, a death benefit of \$A25,000 would be paid to the dependants of a deceased sportsman or sportswoman. Full time professional sportsmen and sportswomen would be excluded from the benefits of the scheme, together with persons involved in the horse racing and trotting industries.

The Report recommends that —

- (i) the only sporting activities covered should be organized competitive sports involving a degree of skill and physical prowess;
- (ii) the participants for whom accident cover should be provided are those paid to play, other than full-time professionals, and persons who are not paid to play, except primary and secondary school students engaged in school competitions; and
- (iii) the scheme should cover official club training sessions and

journeys to and from training sessions and matches, and include all players, whether paid or not, who are registered with the club.

Non-medical use of drugs

The South Australian Royal Commission into Drugs has published its third discussion paper on the non-medical use of drugs.

In its 125-page Paper the Royal Commission calls for an end to criminal punishment for the use and possession of drugs in the State and concludes that it is wrong to assume that there is a substantial consensus in Australia opposed to the non-medical use of drugs. The Commission's Paper argues that it is wrong to think that most people are opposed to the non-medical use of drugs simply because many of them use alcohol, tobacco and pain-killers but pretend that these are not in fact drugs.

The Royal Commission notes that the Proprietary Association of Australia, which represents manufacturers of over-the-counter medicines, has admitted that Australia's analgesic consumption is 160 per cent higher than in Western Europe, 85 per cent higher than in the United States of America and 50 per cent higher than in Britain. Accordingly, the Royal Commission recommends stringent control over the sale of drugs to members of the public but adds that the criminal law in this area should be administered in a way that emphasises not the punishment or deterrence of drug users but the provision of appropriate assistance to persons requiring help because of the nature of their drug use.

The Royal Commission also challenged 12 major assumptions about the use of drugs in Australia—

- (i) that drugs steadily destroy a person's capacity to control his personal behaviour;
- (ii) that drugs are abused only by deviant groups and other undesirables;
- (iii) that those who use illegal drugs are necessarily ill and that medical treatment will cure them of their drug-taking habits;
- (iv) that the sanctions of the criminal law and the threat of punishment will prevent people from taking drugs;
- (v) that the country's education system should teach people not to use drugs;
- (vi) that no-one should risk their health by taking mood-altering drugs;
- (vii) that it is improper to use drugs to alter mood or mental outlook;
- (viii) that the non-medical use of drugs, as distinct from their medical use, is disapproved of by the community and should be eliminated;
- (ix) that no-one can be trusted to make prudent decisions concerning their own drug-taking habits;

- (xi) that government action, including use of the criminal law, can of itself control the non-medical use of drugs; and
- (xii) that non-government action cannot be effective in controlling the non-medical use of drugs.

The Royal Commission discovered that surveys of school children suggested that experiments with tobacco or alcohol were still far more common than the use of cannabis, and that the theory of progression from the use of cannabis to harder drugs was more applicable to the early use of alcohol and tobacco. Also, the Royal Commission concluded that the extent to which drugs are believed in Australia today to have an uncontrollable influence on the behaviour of individuals and even on groups or whole classes of people is exaggerated.

Australia – Tasmania

Mental incapacity and the criminal law

A State Supreme Court Judge has been invited to chair a Commission comprising the Crown Advocate, a nominee of the Bar Association and a representative of the Mental Health Commission to consider a reference with is in the following terms –

- (i) to investigate and report on whether there should be any changes in the law, or in pre-trial, trial, or post-trial, procedures in respect of acts allegedly committed by a person said to be suffering from –
 - (a) any mental disease, or other mental incapacity or disability,
 - (b) an impulse alleged to be irresistible, whether as a result of provocation or otherwise
 - (c) intoxication, or
 - (d) the effects of any drug;
- (ii) in the making of such investigation and report the Commission shall have power to consider whether there should be any changes to any of the provisions of Chapter IV of the Criminal Code as a result of any recommendations made under paragraph (i) above.

Liberalising of criminal law recommended

A Select Committee of the Tasmanian Houses of Assembly has tabled a Report in the State Parliament that recommends liberalisation of the State's laws governing the cultivation of marijuana, abortion, homosexuality, prostitution, vagrancy and drunkenness.

The Select Committee's Report has promoted a great deal of discussion both in Parliament and the Press, and the Report's proposals concerning the cultivation of marijuana and the decriminalisation of homosexual acts between consenting adults have been strongly criticised by certain sections of the community.

Australia— Victoria

Handicapped persons

The Spastic Society of Victoria and the Victorian Hospitals and Charities Commission have received a Report that recommends that handicapped people should have both privacy and responsibility in deciding what sort of relationships they formed, be they heterosexual or homosexual, and that advice on contraception and sterilisation should be made available to such people.

The Report is the first attempt to examine the sexual rights of handicapped people in Australia.

Massage parlours

The Victorian Chief Secretary has agreed to the conduct of a departmental investigation into massage parlours in the State. He added that the State Government would not legalise prostitution.

Autopsies

Following a disclosure that a number of Victorian hospitals were conducting autopsies on the bodies of deceased persons without the knowledge or consent of the deceased's next of kin, the State's Minister for Health announced that the provisions relating to autopsies in the Medical Act 1958 would be reviewed and that he had called for his Department to furnish him with a report on autopsy laws in other parts of Australia and in overseas countries.

Organ transplants

The Premier of Victoria has announced that he has requested the State's Minister of Health to investigate the establishment of a State register of people resident in the State who are willing to donate their organs after their death for use in organ transplant operations.

Drug-trafficking

The Victorian Government has announced that it plans a major review of the State's drug laws, including the imposition of steep increases in penalties, following a two year inquiry into drug problems in the State.

Traffickers in hard drugs, such as heroin and cocaine, will face prison terms of 25 years and fines of \$A200,000, compared with the present maximum penalties of 15 years' imprisonment and fines of \$A100,000.

New offences and penalties will be introduced for unauthorised trafficking in widely prescribed drugs, such as barbituates. A new system of prescription pads, with serial numbers and colour coding, will be introduced to prevent forging of prescriptions.

The Government also plans to ban the advertising of a number of non-prescription drugs sold only by pharmacies in an attempt to prevent their misuse.

The new legislative proposals are included among 47 recommendations made by an inter-departmental working party appointed by the Government in 1978 to investigate the drug problem and whose 219-page Report has been tabled in the Victorian Parliament.

Programme to combat child abuse

The Victorian Government has announced a new programme to combat child abuse in Victoria. The State Premier said that the Government had decided to maintain voluntary reporting and wait to see the effects of compulsory reporting moves in other States.

The new programme will include the establishment or expansion of four child protection units this year. Other units will be established next year.

The main step in the programme is that all policies and services related to child maltreatment will be handled by the Minister for Community Welfare Services. Other moves include the reorganisation of government committees involved with child maltreatment and the development of community information and education programmes.

The inter-departmental committee on child maltreatment will be expanded to include representatives of the Departments of Community Welfare Services, Police and Emergency Services, Law, Education and the Health Commission. Local and regional community groups will be developed with an interest in child maltreatment and will be supported and sponsored by Government Departments. More Government money will be supplied to the Children's Protection Society.

The Premier said that the Government's programme was based on—

- (i) the child's right to his own family where there is love, care and protection for the child;
- (ii) no child should be unnecessarily separated from his or her family if the family can be helped to provide adequate care;
- (iii) parents should receive all possible help in fulfilling their parental role to the best of their ability and in meeting the needs of their society; and
- (iv) in the rare cases where children are in real danger, firm but sympathetic action will be taken.

The Premier issued a policy statement on the topic which said that, "The Government is deeply concerned that the initial emotional reaction to instances of physical abuse of children tends to obliterate the need for a wider approach which recognises all the basic needs of the child."

The Premier added "The Government will continue to implement a policy on child protection which will prevent instances of child maltreatment in the broadest sense and support family life. The Government has directly rejected the punitive approaches of the past. It has recognised that family supportive services are an essential element in reducing the stress that so often leads to instances of child maltreatment."

The Government's policy came out strongly against unnecessary separation of children from their families. The statement rejected the

compulsory reporting and external intervention in family life which, it said, increases stress rather than offering support in times of stress. The Government has accepted that the state should intervene legally in family life only as a last resort and in the best interests of the child. "Where state intervention is the only responsible alternative, however, it must take account of the wellbeing of all family members as well as its obligation to protect the child", the policy statement said. People must be able to feel that they can reach for support services without inhibition or fear. Where children are at risk of maltreatment, high quality services must be rapidly available to families. Those services must come from all sections of government and caring agencies operating as a network, providing a real safety net for times of crisis."

Bangladesh

Population control

The Institute of Law and International Affairs in Bangladesh has completed a study of the legal aspects of population control and has submitted it to the Government. The report, which was financed by the World Bank, examines laws on abortion, contraception, sterilisation, age of marriage, registration of vital statistics and the employment of women and children, and will be used by the government to formulate more "pragmatic programmes and policies", according to the newspaper.

Barbados

Survey of abortion law attitudes

A national survey of doctors, nurses and social workers on liberalisation of the Barbados abortion law carried out by the University of the West Indies has found that 85 per cent of doctors and social workers were in favour of liberalisation, while only a third of nurses supported liberalisation. On the question of abortion being freely available at the request of the patient, doctors and social workers showed reservations and sixty per cent of them were against this. Sixty per cent of the nurses as compared with 25 per cent of the doctors and 6 per cent of the social workers felt that there would be least interest in contraception if abortion were more easily available. The findings of this survey have been published in the West Indies Medical Journal (1977) XXVI. (Noted in IPPF "*Law file*").

Canada

Protection of life

A separate research project entitled "Protection of Life" has developed from the fundamental ethical and legal problems encountered in the Canadian Law Reform Commission's study of criminal law. Because of the common problems and relationship to social values of such issues as definitions of death, euthanasia, and human experimentation, it was thought best to treat these subjects together.

The main objective of the Project is to enable the Commission to present a report or reports to Parliament evaluating the way in which present Canadian law projects life and the quality of life and make proposals for reform where deemed necessary.

The Project is adopting an interdisciplinary approach, and will be conducting extensive empirical and attitudinal research. It also recognizes the importance of thorough consultation and steps are being taken to ensure maximum input from interested groups and individuals.

Research will proceed in three fronts. The first will be the strictly legal approach that will examine issues such as individual rights, consent and the limits of the law. The second approach will be a medical-legal one. This facet of the project will concentrate on four areas including definitions of death, euthanasia, human experimentation and personality and behaviour modification. The final approach will involve considerations of an ethical-sociological nature. Within the ambit of this part of the project will be an examination of medical practice research and an ethical and philosophical overview of the Protection of Life issues as a whole.

In terms of output, the Project sees the publication of study and working papers in various stages, culminating in a Report to Parliament. The study papers and working papers, due to come out in the summer of 1978, will present the Commission's views, at that time on the three main research areas—i.e., legal, medical-legal, and ethical-sociological. Considerable time will then be given to discussion and consultation of the tentative proposals of those papers. In the light of the reactions, the Commission will then publish its Report to Parliament containing its final proposals.

Possession of marijuana

A resolution passed at the recent Annual Meeting of the Canadian Bar Association also calls for decriminalising the law against possession of marijuana and cultivation of it for personal use. The nonprofit transfer of the drug between adults will also be decriminalised, and all laws affecting marijuana usage will be moved to the Food and Drugs Act from the Narcotics Control Act.

In editorial comment on the passage of this resolution it was said that the resolution and problems in implementing it had not been properly thought through.

Canada — British Columbia

Heroin Addicts

The Province's Heroin Treatment Act has now been passed by the Legislature, but some amendments to the proposal as introduced were made following representations by the local branch of the Canadian Bar Association. It had mounted a strong campaign suggesting that certain provisions denied access to due process and offended fundamental principles. The legislation establishes a three

year compulsory treatment programme for heroin addicts. Lawyers had objected to provisions which would have “promoted the State to take control of an individual and required his confinement” without this being done “within a process that affords that individual complete access to the due process of law and fundamental principles of natural justice”.

Canada— Ontario

Mandatory reporting of child abuse

One particularly interesting aspect of the Child Welfare Act, highlights of which were previously reported at (1979) 5 C.L.B.566, is the mandatory reporting of child abuse. The new law attempts to balance the right of a child to be protected from abuse, with the right of a suspected abuser to be protected from unproven detrimental allegations against character or reputation.

This new law, contained in the Child Welfare Act 1978, and which came into force on 15 June 1979, requires that—

every person who has reasonable grounds to suspect in the course of the person’s professional or official duties that a child has suffered or is suffering from abuse...

report the abuse to a Children’s Aid Society. “Abuse” has been defined as:

- physical harm,
- malnutrition or mental ill health of a degree that if not immediately remedied could seriously impair growth and development or will result in permanent injury or death, or
- sexual molestation.

Failure to comply with the new provisions is an offence punishable by a fine of up to one thousand dollars.

The requirement to report abuse overrides the provisions of any other legislation in Ontario and applies to physicians, school authorities and others who were formerly protected by statutory provisions that would otherwise have required them to keep such information confidential. The legislation however specifies that the common law privilege between solicitor and client shall be preserved, thereby granting the legal profession an exemption from the above requirements.

Anyone making a report is protected by the new legislation from civil suit even though the information reported could otherwise be privileged or confidential, and the central register must not contain information that would identify the reporter.

The new legislation requires that information reported to the Children’s Aid Society be transferred to a central register maintained by the Provincial Government after the information has been verified by the child protection agency. The information contained in the register would include the name of the suspected abuser, if

known. The chief purpose of the register is its function of "tracking" child abuse. Any child protection agency which receives a report of suspected child abuse may, by checking with the register, discover whether the suspected abuser has been previously reported to the register by a child protection agency in another jurisdiction of the province.

A suspected abuser who is reported to the central register must receive notice that his or her name has been placed in the register, and be provided with an opportunity to examine the register and to seek expungement or correction of the information therein. The suspected abuser may require a hearing before the custodian of the register and may appeal the custodian's decision to the Supreme Court.

Although, the new law has been in force for a short period of time, it has already caused controversy within the legal profession and among the public at large.

The Legislature has found it necessary to curtail some of the traditional civil rights of suspected abusers in order to give greater protection to children from abuse.

The contents of the register must be kept confidential, subject to the exception that certain individuals and agencies may have access to the register. The exception includes any person identified in the register, child protection agencies, coroners and, where approved by the custodian of the register, a legally qualified medical practitioner.

It is worth noting that a person's name may be added to the register where there are reasonable grounds to suspect that he or she is a child abuser and where the information has been verified, although the facts of the information may not have been proven in civil or criminal proceedings. The information must be kept in the register for at least 25 years unless that is expunged earlier pursuant to a request from the suspected abuser.

It is understood that several requests for expungement received from persons who have been identified in the register as suspected child abusers, are under consideration.

India

Prohibition

The Central Prohibition Committee, which includes representatives of all states, has decided that India will outlaw drinking within four years. The representatives of states agreed to make prohibition subject to the Constitution, or a subject under the Central Government. At present only the state governments have the power to pass laws outlawing drink.

Delhi, the capital, will be the first to have total prohibition. The state government has announced that it will bring in legislation to ban liquor advertisements.

Kenya

Sexually transmitted diseases

The Minister of Health has asked Professor U. U. Uche of the University of Nairobi to make recommendations for amendments to the law relating to sexually transmitted diseases.

New Zealand

Royal Commission on Contraception, Sterilisation and Abortion reports

In June 1975 a Royal Commission on Contraception, Sterilisation and Abortion was appointed. It consisted of six, three men and three women, and was required to examine the legal, social and moral issues raised by the law and practice relating to contraception and voluntary sterilisation, and to examine the present law on abortion, its interpretation, practice and adequacy in meeting society's needs. Study of issues involved in abortion were to include the rights of the pregnant woman and the status of the unborn child. The Commission was required to recommend any changes in law or practice relating to these three broad areas and assess the likely effects on the present health, hospital and medical services.

The Commission presented a 450-page report in March 1977. This has excited strong reactions from many quarters, mainly over the recommendations relating to abortion. The Commission took the view that the status of the unborn child "although not absolute, should receive protection from the law". Following this principle it recommended extending the grounds of abortion, at present preservation of the mother's life or health to instances where there would be serious danger to the life or the physical or mental health of the pregnant woman or serious physical or mental abnormality of the child, or where pregnancy is caused through incest, or in cases where the pregnant woman is severely abnormal.

The Commission did not recommend that pregnancy resulting from rape, the extreme youth or age of the pregnant woman or socio-economic factors as such should be, taken by themselves, sole grounds for abortion.

The Commission recommended that a Statutory Committee should have over-all supervision of the administration of the abortion law. A number of panels, consisting of two doctors and a social worker should be set up to hear applications for abortion, would be responsible to this Committee. The social worker should be in an advisory capacity only, and in the event of deadlock, another doctor would be called in. The applicant's own doctor or specialist should be able to make a written statement to the panel, but not take part in making the decision.

It is explicitly predicted in the Commission's introduction to its Report that "... if effect is given to all the recommendations ... the number of abortions performed in this country will be reduced".

The Commission's recommendations on contraception and steril-

isation were less controversial. There is an emphasis on the need for courses on human development and relationships to be provided in all schools, on the need for the expansion of family planning clinics and centres helped by finance from the Government, and on an increase both in Government and non-Government social workers and counselling facilities.

Under the Police Offences Amendment Act 1954 it is an offence not only to sell or provide contraceptives to children under 16 but also to give any information or instruction in the use of contraceptives. The Commission recommends that this be modified to allow doctors to supply contraceptives to those under 16, and to allow certain classes of people to give children under 16 information on the use of contraceptives. Broadly these classes cover those approved by the Education and Health Departments or those approved by the principal of any school.

The legality of voluntary sterilisation for men and women should be put beyond doubt, counselling services made available to both parties, and facilities for sterilisation established in all public hospitals. The consent of the partner was considered to be desirable but not mandatory. One recommendation that has raised criticism is that an application for the sterilisation of a handicapped person could be initiated by the Superintendent of any institution or home, a doctor or a social worker.

Any doctor or related worker should in the Commission's view be able to opt out, on grounds of conscience, of providing contraceptive, abortion or sterilisation services, but there should be an obligation on that person's part to refer the patient to another doctor or agency. The Report stressed the importance of giving medical students adequate instruction in family planning and of providing doctors with regular refresher courses in contraceptive techniques. The Department of Health is enjoined to produce up-to-date reliable booklets on contraceptives and their use, and films on sexually transmitted diseases.

The Minister of Health has said that the Government will bring down legislation in the near future embodying the recommendations of the Commission. There will be a "conscience" vote upon them in Parliament, and the debate will therefore not follow any party lines.

Discipline in professional bodies

The ninth Report of the Public and Administrative Law Reform Committee, presented to the Minister of Justice in December 1976, has recommended that the disciplinary provisions of a number of professions and occupations be amended, where necessary, to provide –

- (i) for lay representation on disciplinary bodies;

- (ii) for the review by a lay representative of the treatment of complaints;
- (iii) for the separate membership of the investigative and disciplinary bodies, adequate appeals rights to both parties, and compliance with the principles of natural justice; and
- (iv) for the grounds of cancellation or suspension of membership to be appropriate to the profession or occupation.

A working paper on disciplinary and complaints procedures of the legal profession is summarised in the report and a full report on this topic is expected in mid-1977.

Negligence, incompetence, and professional misconduct

The New Zealand Law Society has expressed the view that although negligence and incompetence may be ingredients of professional misconduct, it is opposed to declaring negligence to be a ground for disciplinary action. It has called on district societies to make sure that solicitors are available to sue other solicitors for negligence. Although penalties could be imposed for incompetence, the answer really lies in the field of education. The Society added that it seemed wrong for an otherwise blameless practitioner, perhaps of high standing, who made a mistake in a complicated deed, to be for that reason the subject of disciplinary proceedings.

Guidance rule for custody and access psychiatric reports

The New Zealand Branch of the Royal Australian and New Zealand College of Psychiatrists has formulated a "position statement on the role of the consultant in matters relating to custody and access of children." It reads as follows—

The RANZCP accepts the following principles as guiding the role of the psychiatric consultant in matters relating to custody and access of children.

General principles

- (i) The emotional and physical well-being of the child should be the paramount consideration of those persons involved in matters of custody and access.
- (ii) The best interests of the child are served when provision is made for its uninterrupted care by an adult(s) to whom it is psychologically bonded.
- (iii) Principles of reconciliation and conciliation within marital dissolution consolidate rather than compete with the above principle.
- (iv) When conflicts cannot be resolved and custody and access are disputed, the concept of the least detrimental available alternative should prevail as guidelines to serving the child's best interests.
- (v) There is no general principle that can be invoked to suggest that, considered on the basis of gender alone, one parent or the other is the more appropriate custodian.
- (vi) There is no general principle that can be invoked to suggest that biological ties alone make an adult the most appropriate custodian, although it is recognised that most frequently a biological parent is also the psychological parent.

- (vii) Any procedures which diminish the adversary process and foreshorten the time involved in litigation, will tend to favour the well-being of the child and the family as a whole.

Specific recommendations

The following recommendations are offered as guidelines to the psychiatric consultant in cases of disputed custody and access of children—

- (viii) That the College upholds the legal position that the best interests of the child are served when the Court, upon receipt of all available evidence and opinions, makes a decision on matters of custody and access.
- (ix) That the College firmly upholds the principle of child representation and encourages its members to support this principle by responding whenever possible to requests for psychiatric evaluation which issue from the child's counsel or solicitor.
- (x) That the College advises members to avoid partisanship in their role as expert witnesses. Members need to be aware of the pitfalls attendant upon responding as a witness called by one party within the framework of the adversary system. Although the College does not recommend that its members should avoid such a role, it advises that members may face risks to their credibility as advocates of children when they agree to accept a brief.
- (xi) That the College affirm its confidence in the validity of detailed clinical investigations. Formal test procedures in the hands of a skilled clinical psychologist may augment and complement such detailed clinical assessment, but they do not replace it, nor can they stand alone.
- (xii) That the College advises its members to follow certain psychiatric procedures known to be of proven value in the assessment of parties to custody and access disputes.
 - (a) Psychiatric evaluation of a child.

This is best done by seeing the child individually, and by an experienced child psychiatrist, child psychologist or child psychotherapist. If the child is able to verbalise a stated preference regarding custody and access this should be given due weight.
 - (b) Psychiatric evaluation of each parent and the associated spouse or de facto of each new household.

This evaluation should be routine.
 - (c) Conjoint assessment of the ex-marital pair and conjoint family assessment.

Since this is one of the most sensitive and productive instruments of psychiatric evaluation in family work, its implementation should be attempted wherever possible.
- (xiii) The College advises that in a written report to the Court, the expert witness includes a basic format stating—
 - (a) The general principles upon which he or she operates.
 - (b) The clinical and test observations made during the process of assessment.
 - (c) The observations which could not be made because of limitations imposed by realities of the situation.
 - (d) The inferences which he or she, because of knowledge and expertise in the speciality drew as a result of these observations.
 - (e) The opinion which he or she offers to the Court.
- (xiv) That College members recognise that their reports, no matter how expert, full and painstaking, are to be regarded as opinions, to be placed alongside the evidence and opinions of others, in a process that will ultimately lead to decisions reflecting the best interests of the child.
- (xv) That College members regard their reports as educative, adding to the growing awareness among the judiciary and others of the value of the contributions that the behavioural sciences can make in such matters."

Papua New Guinea

Sorcery among the Tolai people

Mr. William Kaputin, a Commissioner of the Law Reform Commission of Papua New Guinea has prepared a paper on this topic, now published by the Commission as Occasional Paper No. 8. The Report embodies the collective views of prominent Tolai people who were interviewed individually, and who have in fact experienced the existence, effect and fear of sorcery. These were government officials such as magistrates and policemen, ministers of religion, village elders, ordinary people and sorcerers. The author notes that it is interesting that people with different occupations and influence should be unanimous in acknowledging the existence and effect of sorcery as a reality. The paper does not cover all forms of sorcery or magic known among the Tolai people, only the major ones.

Trinidad and Tobago

Abortion law and public opinion

Controversy over abortion is mounting in Trinidad and Tobago, sparked off by a survey carried out by a doctor at the University of the West Indies, Dr. Syam Roopanrinesingh, which indicated that public opinion is in favour of liberalisation of the abortion law. Currently the law is the same as the prohibitive United Kingdom legislation on abortion of 1861, except for the fact that penalties imposed have been considerably reduced. The Archbishop of the Port of Spain, Mr. Antony Patin has spoken out against liberalisation and the Prime Minister has spoken against abortion and sterilisation. However the President of the Family Planning Association, Mr. Emile Elias, has said that any move which takes abortions "out of the back room" would be welcome. Data provided by the FPA indicates that there were an estimated 12,500 illegal abortions in 1963 (noted in IPPF "Law file").

United Kingdom

Wearing of seat belts may be compulsory

After experiencing difficulties with national legislation to make the wearing of seat belts mandatory, the Government is believed to be considering using its special powers to introduce the measure to Northern Ireland for an experimental period. The chances of being killed in a road accident there are double those of anywhere else in Britain; driving standards are low, the intake of alcohol is high, and the civil unrest is also thought to contribute to the province's notorious road toll.

Drivers prescribed drugs

A medical officer has recommended that professional drivers of buses, trucks and taxis should not be allowed to drive if they are taking medicine which might impair their ability. As they drive longer hours, the risk of adverse drug reaction or interaction is

greater, and loads carried by their vehicles are often hazardous. The safest course is for doctors to give such drivers medical certificates to enable them to have time off from work. (Times newspaper, 17 September 1977.)

Battered children

In its annual report (*For the children's sake*, from 1 Riding House, London W1) the National Society for the Prevention of Cruelty to Children estimates an average of two deaths a week as a result of parently-inflicted injury, and that nearly another 8,000 children receive non-accidental injuries. It labels the "cold, calculated torture" of children as a "tragic and shameful reflection" on present-day community attitudes, but notes that central registers can help detect non-accidental injury and monitor the safety of an abused child. The NSPCC's own special units had produced encouraging results, and should be extended to all major urban areas as a matter of urgency.

Vibration

The British Society for Social Responsibility in Science has called for legislation to limit the amount of vibration that workers suffer. Vibration can cause or contribute to backache, "dead finger", piles, hernias, varicose veins and muscular aches and pains. The Society also brought out the need for scientific evidence on which to set "safe" exposure levels. The present safety standards are based on healthy young men whereas the evidence is that women, who make up a third of the engineering labour force, are more susceptible.

Centres for drunkenness show value

The first experimental detoxification centres in England seem to be making an impact on drunkenness. Government statistics show that the number of findings of guilt for offences of drunkenness by males in West Yorkshire fell by 2 per cent last year.

The first centre for males opened in May, 1976, in the West Yorkshire Police Force area. That year, there was a 1 per cent fall in findings of guilt for offences of drunkenness by males in the country.

However, the combined number of findings of guilt and admissions to a detoxification centre in 1977 in West Yorkshire was 5,234, an 11 per cent increase over 1976.

The report says that the opening of a second centre in Greater Manchester in October 1977, did not significantly affect the figures there for that year.

The police can take to the centres offenders, particularly habitual ones, as an alternative to prosecution.

The total number of findings of guilt by the courts in England and Wales was 108,871, only 173 more than in 1976.

How to combat drunkenness?

The Secretary of State for Social Services subsequently invited the public to suggest the action which should be taken to counter increasing drunkenness. He posed eight questions —

- (i) should people be allowed to drink themselves to “death or disintegration” and damage those around them, with the Government not concerning itself with personal behaviour or having a duty to seek to contain a growing ill?
- (ii) should a bigger tax on alcohol be imposed or was that unfair to sensible drinkers?
- (iii) should tax policies to ensure that the price of drink remained constant in relation to income, as recently advocated by his advisory committee, be used or not?
- (iv) should the law on drinking and driving be made severer, perhaps by random breath tests, increased penalties and/or a lower limit of alcohol in the blood than the present 80 milligrams to a 100 millilitres which now incurred conviction?
- (v) should the age at which alcohol was legally available be changed, or should there be more rigorous enforcement of the law?
- (vi) what was the best way to halt the apparent increase in heavy drinking among young people?
- (vii) should a more restrictive code on advertising be introduced, presenting a less one sided picture about drinking, especially to young people?
- (viii) what sort of publicity about the dangers of drinking was most effective? Should bottles be labelled as are packets of cigarettes, with a health warning?

He said it was time the British people faced the fact that there was a very serious drink situation, which was growing year by year. In the past 20 years beer consumption had increased by about half and nearly three times as much spirits and more than four times as much wine per person was being drunk. Convictions for drunkenness had doubled in the same period; convictions for driving under the influence of drink or drugs had doubled from 25,000 in 1970 to about 50,000 last year.

There was growing evidence of alcohol abuse among young people generally and there were also difficulties because of drinking while at work.

To what extent could the appalling increase in crimes of violence, hooliganism and football violence be blamed on too much drinking? There was no simple answer. It was a matter concerning the police and the courts, doctors, the family and everyone. “Is it a problem which should be tackled more vigorously by the Government?” he asked.

Hormone imbalance found in violent offenders

A link between aggression and body chemistry in psychopaths has been discovered by research at Broadmoor Special Hospital.

The discovery could possibly be used in future to help decide whether and when a prisoner can safely be released.

The key is the psychopath's hormonal balance. When people feel fear, there is an increase in the level of adrenalin, one of two hormones of the adrenal gland. But the amount of noradrenalin, the other hormone, increases with aggression.

Among psychopaths tested, 24 per cent had an excess of noradrenalin over adrenalin.

That hormonally-imbalanced 24 per cent contained 57 per cent of the patients convicted of crimes resulting in death.

The hormone imbalances appear to have links with social class and personality.

"These findings are particularly interesting when you consider that children from poorer backgrounds have harder living conditions and get more physical punishment", the researchers say. "Studies on aggressive social behaviour caused by parents' discipline suggest that this physical punishment is allied to aggression outside the home.

"A person's predisposition to aggression can therefore be changed by his childhood environment—but aggression also relates to whether there is more noradrenalin than adrenalin."

Thus concludes that there is strong evidence that environment in childhood can alter the basic biochemical processes and bring out the aggressive side of an individual's personality.

Independent review of hospital complaints in the National Health Service

In the First Report (Session 1977–1978) of the Select Committee on the Parliamentary Commissioner for Administration (HMSO: £5.60) the Committee felt that there should be a more flexible, faster and more confidential and tactful form of inquiry in this area, provided that it is scrupulously carried out and commands respect.

The mechanism which recommended itself to the Committee is the Health Service Commissioner's office. The Report notes that he would require appropriate professional advice, that he would need to be scrupulous in protecting staff from unwarranted dangers based on unrealistic expectations and on hindsight, and that one of his main concerns would be to help the National Health Service as a whole, learning from each incident investigated, while minimising the distress to those immediately involved.

Recognizing the problem of double jeopardy, and the possibility of the complaint procedure being used as a "dry run" before litigation, the Committee saw no complete solution. It rejected the concept of a statutory bar to the courts when the complainant elected

to ask the Commissioner to investigate his case, and saw it as one of the main difficulties of the Health Service Commissioner's task to minimise this danger.

The most controversial question faced by the Committee was whether complaints relating to clinical judgment should be included in any new form of independent review of complaints. It sympathises with the dangers seen by the medical profession—that hindsight would render judgments made with the utmost care and skill but necessarily on the balance of probabilities (which involves of necessity a probability of occasional error) the appearance of malpractice. However the Committee noted that the Secretary to the Mental Welfare Commission for Scotland had observed that “if clinical judgment is sound it should bear investigation by those competent to evaluate it.” The Committee's recommendations are as follows—

- (i) there should be a simple, straightforward system for handling complaints in every hospital with emphasis on listening carefully to the patient's or relative's concern and dealing with it promptly;
- (ii) when the complainant is not satisfied by the answer he obtains from those immediately involved and wishes to pursue the matter, it should be dealt with by the District Administrator (or a senior officer specified by him) on behalf of the Area Health Authority;
- (iii) Health Authorities should not set up ad hoc inquiries into complaints;
- (iv) for the most serious cases the Secretaries of State should continue to set up inquiries under s. 84 of the 1977 Act (formerly s. 70 of the Act of 1946) or under s. 69 of the National Health Service (Scotland) Act 1947;
- (v) all other cases not resolved as in (ii) above should be referable by the complainant or the Area Health Authority to the Health Service Commissioner, including complaints concerning clinical judgment. The Commissioner's role should not be to criticise actions or judgments which, even if they turned out to be mistaken, were reasonable at the time in the light of current knowledge and information and of circumstances then ruling. On the other hand, if someone had suffered injustice through actions or judgments which were unreasonable in all the circumstances, the Commissioner should recommend whatever action seemed to him appropriate and should attempt to ensure that useful lessons for the future were drawn from past experience.

Second Report on the System of Ombudsman in the U.K.

The House of Commons Select Committee on the Parliamentary Commissioner for Administration has published a Second Report on the system of Ombudsmen in the United Kingdom (Session

1979–80:HMSO £3 net). The Committee considers the reports of the Parliamentary Commissioner for Administration and the Health Service Commissioners for England, Scotland and Wales. There are, in addition, a number of other Ombudsmen in the United Kingdom and the Committee in this report examines the extent to which together they provide a comprehensive, accessible and effective ombudsman service for the citizens of the United Kingdom.

The report notes in a short background history the functions of the multiplicity of Ombudsmen that exist in the United Kingdom as compared to countries like Sweden, Israel and New Zealand where a central Ombudsman office deals with complaints against a wide range of public authorities. The report notes that the following Ombudsmen exist in the United Kingdom—

- (i) The Parliamentary Commissioner for Administration, created in 1967 to investigate complaints against central Government Departments;
- (ii) Health Service Commissioners for England, for Wales and for Scotland created under the National Health Service Re-organisation Act 1973 to investigate complaints against health authorities (although since their inception all three posts have also been held by the Parliamentary Commissioner thereby insuring a degree of uniformity in the handling of complaints);
- (iii) The Commissions for Local Administration in England, in Wales and in Scotland. In the case of England and Wales there are three and two Commissioners respectively, each of whom investigates complaints against local authorities, police authorities and water authorities in their areas. In the case of Scotland there is a single Commissioner who investigates complaints against local authorities and similar bodies;
- (iv) The Parliamentary Commissioner for Administration for Northern Ireland, who investigates complaints against Departments of the Government of Northern Ireland;
- (v) The Commissioner for Complaints for Northern Ireland, who investigates complaints against local authorities, health authorities and other public bodies in Northern Ireland.

The Report notes from the evidence given as well as the written memoranda submitted to the Committee by a representative cross-section of the Commissioners and others, that the procedure for access to the Commissioners is not uniform. In some it is direct while in others it is indirect. It also notes that the limits of the functions of the various Commissioners is not sufficiently clear in people's minds which, together, have contributed to the misdirection of complaints. However, any obstacle to fruitful co-operation between some of the Commissioners which the absence of a statutory link might have caused has been overcome by goodwill and free consultation whenever the need was seen.

The Committee notes that administrative arrangements have been

made among the various Ombudsmen's offices for the redirection of wrongly addressed complaints but considers that these, although apparently satisfactory, are not a complete solution. It therefore considers the possibility of devising a method of access common to all Ombudsmen. The two possibilities which they consider are direct access and the suggestion that, in addition to the existing methods of access, Members of Parliament should be able to refer complaints to any of the Ombudsmen.

However, the Committee felt unable to recommend unqualified direct access as a uniform method, having previously rejected it in 1978. As regards the second alternative, the Committee heard evidence indicating that this proposal did not find general support. Although it notes that the present arrangements for access were not ideal the Committee did not feel disposed to press the suggestion that Members of Parliament should be able to refer complaints to the Local Ombudsmen, having regard to the fact that the Commission for Local Administration in England was keeping the matter under review.

The evidence given before, and memoranda submitted to, the Committee form part of the Report.

National Health Service complaints

The "Fifth report from the Select Committee on the Parliamentary Commissioner for Administration" (H.C. paper 616) expresses complete confidence in the Ombudsman's handling of a National Health Service complaint. Sir Idwal said the hospital authority's initial response to the complaint was deplorable. It had given an inadequate reason for discharging a patient in the middle of the night and based its action on a premise that there was a shortage of beds, which was later found to be without foundation. Sir Idwal described the incident as a shocking case of maladministration.

Doctors complained that the Commissioner had said that he could not comment on clinical judgment by the junior doctor in charge yet he had concluded that the doctor's decision was 'inhuman', although that decision was part of the doctor's clinical judgment.

The report gently chides the commissioner for not getting in touch with the doctor, who had left the country to work in America.

Whether the commissioner was right to describe the decision to discharge the patient as 'inhuman' was a matter for his judgment, but the committee fully supported the view that the decision merited strong criticism, and in the words of a consultant at the hospital, lacked common sense.

Blood and a criminal's profile

Research at Aldermaston suggests that in the not too distant future it may be possible for police investigating a violent crime to give

forensic scientists a blood stain left by a criminal and receive back a fairly detailed profile of age, sex, travelling habits and diet.

When the criminal is caught his blood will be matched like a fingerprint to the stain, which the scientists will be able to prove was shed at the time of the crime.

Report of the Royal Commission on Civil Liability and Compensation for Personal Injury

The Report of the Commission, appointed in 1973, has now been published (Cmnd. 7054: HMSO: Price £7.60 Volume I £3.60, Volume II £3.60, Volume III). Running to over 1,100 pages, the Report suggests —

- (i) a new 'no fault' compensation scheme for motor vehicle accidents on the roads, paid for by a levy of about 1p a gallon on petrol and administered by the State. It would be modelled on the Industrial Injuries scheme but would cover the whole family;
- (ii) an improved Industrial Injuries scheme providing higher benefits and extended to cover (a) the self employed (b) commuters and (c) additional cases of occupational diseases; and
- (iii) a new benefit of £4 a week, tax free, from the age of two, as an addition to child benefit, for all severely handicapped children, whatever the cause of their handicap. Attendance allowance and mobility allowance would still be payable where applicable. Mobility allowance, now paid from the age of five, to be paid from the age of two.

The first volume is the main volume. It describes the main features of compensation in the United Kingdom, common criticisms of those systems and features of particular interest in overseas systems. The second volume contains the necessary information on statistics and costings and the results of a household survey undertaken for the Commission. The third volume contains information as to overseas systems of compensation for personal injuries and results mainly from visits made by the Commissioners, or groups of them, to overseas countries, and it is believed that there is no comparable collection of such information.

The Commission conducted a detailed study of other systems of compensation (which perhaps renders Volume III the most valuable part of the Report so far as other jurisdictions are concerned), but concluded that the much-criticised common law action for damages should be retained while at the same time arguing that there should be a shift in the emphasis of providing compensation — away from tort towards social security. Social security should be recognised as the principal means of compensation. The function of tort would become that of supplementing the no-fault system of social security.

Tort and assessment of damages

The Commission does not recommend the abolition of tort but suggest a number of modifications, including the ending of double compensation; inflation proofed periodic payments in the most serious cases; elimination of minor claims and a change in the assessment of damages.

Double compensation to end

The Commission recommends that double or overlapping compensation should be eliminated by fully offsetting social security benefits against the assessment of the corresponding tort damages. The social security benefits provide, and provide quickly, the basic compensation for the injured person without his having to prove that his injury was caused by any other person's fault. The current provision for offsetting social security benefits against tort awards to the extent of 50 per cent of those benefits for up to five years was a compromise between two principles (a) that the injured person should not be compensated twice for the same loss and (b) that social security benefits represent the fruits of the individual's own thrift and should be disregarded.

It is considered that the social security system could no longer be regarded in this way as a form of first party insurance. If no one was to receive, as total compensation, more than 100 per cent of his loss, it must follow that of two persons, if one received a higher percentage of his loss in benefits, he must receive a lower percentage in damages. The low earner would receive a higher percentage of his loss in benefits and so must receive a lower percentage in damages. The same would be true of the married man with children compared with the single man with the same income loss.

Inflation-proofed periodic payments

The Commission recommends that provision should be made for damages to be normally in the form of inflation-proofed periodic payments in the most serious cases. The court should be obliged to award periodic payments in such cases unless satisfied that a lump sum was more appropriate. An injured person should still be at liberty to settle his claim by agreement for a lump sum if he wishes to do so, but his professional advisers should be under a duty to point out the advantages of periodic payments. (There is a dissenting opinion by two members, opposing the introduction of periodic payments).

Elimination of minor claims

There should be a three months' "time threshold" for damages for non-pecuniary loss. This means that there would be no damages for pain and suffering and loss of amenity in the first three months after the occurrence of the injury. This would eliminate the very numerous minor claims for non-pecuniary loss and so save administrative costs as well as minor compensation payments.

Change in the assessment of damages

Numerous questions as to the assessment of damages are dealt with in the Report. Of special interest and difficulty is the problem of arriving at a suitable lump sum of damages to compensate for the lost flow of income over a long future period of years, having regard to the problems created by high and fluctuating rates of inflation and high and possibly changing rates of taxation of investment income.

The present multiplier method was simple and well understood and it could readily be operated by practitioners. The Commission thinks that this method should continue to be used but there were two views on the actual method of calculation.

The majority view was that the calculation of lump sum damages for future pecuniary loss should continue to aim at year by year replacement of the plaintiff's loss. Real values should be reflected by taking fuller account of the effects of tax and inflation.

The minority view (represented by the Chairman and three other members) was that a lump sum was different in kind from a lost income; it was a substitute compensation not a replacement. Due regard should be paid to real values and awards should be reasonable, not excessive.

Work Injuries

The Commission says that there was a remarkable unanimity among their witnesses that the structure of the Industrial Injuries scheme had stood the test of time. It could see no better alternative in overseas models, nor any way of devising one themselves. It concludes that the scheme should remain essentially as it is but that it should be extended and improved. Among the changes proposed are benefits based on the new pension scheme, which came into force in April 1978; the inclusion of the self employed; cover for commuters and additional cases of occupational diseases.

Benefits based on the new pension scheme

As those who obtain tort compensation for work injuries would also have been entitled to industrial injury benefit, the ending of duplication of compensation, without anything to balance it, would have implied a sharp drop in the money they receive.

Improved long term industrial injury benefit should therefore be paid immediately. These would be the maximum benefits (ordinarily paid after 20 years contributions) under the Social Security Pensions Act 1975. Slightly higher short term benefits for the first six months would also be paid.

In addition to loss of earnings benefits, disablement benefit may be paid, as may attendance allowance and mobility allowance.

“Although each element in the total is in our view justified”, says the Commission “there can be little doubt that there will be problems over incentives to return to work”. The Commission says that the

Government should consider total benefit levels in the light of their long term plans for social security.

Corresponding improved benefits would be paid to widows. Widowers would be treated in the same way as widows.

The existing provision for partial incapacity is unsatisfactory and the Commission recommends a study of the operation of European provisions for partial incapacity with a view to the early introduction of a scheme in this country.

Self-employed

The Commission considers that the self employed need compensation for a work accident just as much as employed persons, and should be covered by the Industrial Injuries scheme. Thus they would, for the first time, become eligible for disablement benefit. Until earnings related supplement becomes payable to them under the social security scheme, benefit for them and their widows must be on a flat rate basis.

Commuters

The Commission recommends (by a majority of one) that commuters should be covered by the Industrial Injuries scheme. About 60 per cent of them would be entitled to compensation under the "no-fault" road scheme if not covered by the industrial injuries scheme.

Occupational diseases

The conditions for compensation for occupational diseases should be less restrictive. A mixed system should be introduced so that, in addition to the existing schedule of prescribed diseases, benefit should be paid where the claimant can prove that his disease was caused by his occupation and that it was a particular risk of his occupation.

The Commission felt unable to recommend that a special compensation scheme, similar to the National Coal Board Pneumoconiosis Compensation Scheme, should be set up for workers in the slate and quarrying industries.

Financing the scheme

The scheme should continue to be financed through the existing system of national insurance contributions and Exchequer supplement. The cost for employed persons should be met by an increase in the employers' social security contributions but there should be no increase in employees' contributions. [Professor Prest, dissenting from this recommendation, says one alternative would be to levy a surcharge on employers' liability premiums.] For the self-employed the cost should be met by an increase in their contributions. The decline in tort would mean a fall, in real terms, of about 25 per cent in employers' liability insurance.

The Commission believes that its proposals would lead to improve-

ment in provision for work injuries. It says that the system “is fundamentally sound. The TUC told us that their approach had been to see what might be done to improve the Industrial Injuries scheme and the tort system rather than abolish them. That has been our approach too.”

Tort

The Commission recommends that the right of an injured workman to pursue tort action for personal injury against his employer should be retained. [Professor Schilling dissents and supports the views expressed by the Robens Committee that action in tort is counter-productive to accident prevention.]

It also recommends that there should be no change in the basis of tort liability; and no formal reversal of the burden of proof in tort actions for work injury.

Road injuries

The “no-fault” compensation scheme recommended for motor vehicle injuries should be modelled on the scheme proposed for work injuries, with benefits at broadly the same level.

Special provision should be made for children and non-earners including housewives and retirement pensioners.

The scheme should be administered by the Department of Health and Social Security and should be financed by a levy of about 1p a gallon on petrol.

The Commission’s decision to recommend a “no-fault” scheme for road injuries stemmed largely from its review of the operation of the tort system in this field.

The improved Industrial Injuries scheme was the obvious choice for a model in that it provides inflation proofing and adequate benefits for long term incapacity. There was one important modification — the inclusion of non-earners — who are not covered by the Industrial Injuries scheme.

Scope of the scheme

The scheme would be confined to injuries caused by motor vehicles and incurred on roads or other land to which the public has access.

It should not be necessary to establish that a motor vehicle was in motion. For example, an injury sustained by a cyclist who crashed into the back of a vehicle in an intermittently moving queue of traffic should not be excluded. The test should be whether a motor vehicle was involved.

The Commission decided that claims by those whose injuries result from their own serious misconduct should be dealt with at a central point. It recommends that the Secretary of State for Social Services should have a discretionary power to discontinue benefit for those injured by motor vehicles on their way to or from committing an

offence for which they were subsequently convicted on indictment, or in the course of committing such an offence. But this power should be exercised only in exceptional circumstances when the payment of benefit would clearly be repugnant to public opinion [Mr Marsh and Professor Stevenson dissent from the recommendation that there should be power to discontinue benefit].

The Secretary of State's discretion should not extend to benefits paid to widows and dependants of those who die in the course of criminal activities.

Financing the scheme

Among the alternatives considered were levies on driving licence fees, road fund licence fees, motor insurance premiums and a levy on petrol. The method of petrol levy was decided upon because it was the most practical way, contributions being easily and cheaply collected. The Commission recognised that the levy would involve hypothecation (earmarking) of revenue and would thus be a departure from the usual approach to raising revenue. Motorists' contributions would relate closely to the amount they used their cars as well as to engine size [Professor Prest dissents and is in favour of a levy on insurance premiums].

The extra cost of the scheme, over and above the cost of social security sickness and other benefits now paid including administration costs, is estimated at £28m after five years rising to £54m a year at maturity. The total cost, including sickness benefit and other benefits, would be about £64m after five years, rising to £90m a year at maturity after 40 years. The cost would be met by a levy of about 1p a gallon on petrol.

Against this, the cost of tort compensation would fall by £40m a year, including savings on administration and £1m for occupational sick pay. In view of the keen competition in the motor insurance market the Commission has no reason to doubt that this saving would be passed on to motorists. But if it became apparent that real savings were not being passed on, the Government should not hesitate to intervene.

Tort

It is recommended that there should be no change in the basis of tort liability and no formal reversal of the burden of proof in tort actions for motor vehicle injury.

Air transport

Because liability is largely governed by international conventions the scope for change as regards the liability for carriers is limited.

But the present level of limits — between £25,000 and £37,450 — should be revised. The Montreal Protocol No. 3 provides for a

limit of about £70,000. The United Kingdom should ratify it as soon as the U.S.A. have done so.

In the meantime the United Kingdom would be justified in taking steps unilaterally to end anomalies and to provide a minimum limit to carriers' liability on all flights to, from and touching the United Kingdom. This should be equivalent to the special contract limit of £37,450 applying to British airlines.

Further consideration should be given to the possibility of imposing third party insurance for private aircraft.

Sea and inland waterways

In an area traditionally governed by international agreements it would be inappropriate to recommend a new system of liability for the United Kingdom alone. The idea of imposing strict liability was rejected but the United Kingdom should take steps to implement the London Convention which it is hoped will soon be brought into force thus increasing to £30,000 the limits of liability.

The provisions of the London Convention should be applied to inland craft.

Pending the implementation of the Montreal Protocol No. 3 the limit on international hovercraft journeys should be equivalent to the special contract limit applying to British airlines and the limit for hovercraft journeys within the United Kingdom should be increased to £37,450.

Rail

A "no-fault" scheme is ruled out as not being appropriate for rail but the introduction of strict liability is recommended for injuries caused by the movement of rolling stock. Railway undertakings should not be strictly liable for injuries or death to trespassers.

Products

The number of injuries caused by products is relatively small and the risk of death is lower than for other categories of injury. There are no published statistics, but the Commission's own survey suggests that between 30,000 and 40,000 injuries a year may be caused by defective products other than drugs. Of these, something over 10,000 occur at work, and a further 10,000 involve services as well as defective products.

There was no justification at present for introducing a "no-fault" scheme for injuries caused by defective products.

The imposition of strict liability would, however, meet most of the objections to the current law. A scheme EEC based broadly on the Council of Europe Convention and the EEC draft directive should be introduced.

Products liability was considered in the context of public concern to protect the interests of the consumer and among the

Commission's detailed recommendations are —

- (i) both producers of finished products and component producers should be strictly liable, but in general distributors should not;
- (ii) importers should be treated as producers;
- (iii) it should not be a defence for a producer to prove that he had withdrawn or attempted to withdraw his product [Mr Marshall dissents so far as it applies to aircraft];
- (iv) the producer should not be allowed a special defence for development risks. The production of a new drug is a particularly striking and important example of the kind of development risk which might be covered by such a defence;
- (v) there should be no financial limits on the producers' liability;
- (vi) the producers' strict liability in tort should be subject to a cut-off period of ten years from the circulation of the product;
- (vii) movable products incorporated in immovables, such as building materials incorporated into a house, should be regarded as "products".

Drugs

Special mention is made of the difficulties arising from the decision to apply strict liability to drugs. The pharmaceutical industry is opposed to strict liability. The Commission considered that no special treatment could be justified, notwithstanding their decision not to recommend either a special defence for development risks or a financial limit on liability.

Services

Liability in negligence should be retained for services and there should be no formal reversal of the burden of proof. Included are personal services such as hairdressing, the supply of professional, managerial or labour services in person or otherwise, and information and advisory services, as well as those services related to products.

While recognising that different treatment of services and products would result in some anomalies, the Commission thought that this would be preferable to the problems which could arise if strict liability for services were imposed.

Medical injury

The Commission concludes that a "no-fault" scheme for medical accidents should not be introduced at present and the negligence action should remain. It recommends, however, that strict liability should be imposed on any authority to whom a volunteer for research or clinical trials has consented to make himself available and who suffers severe damage from those trials.

It also recommends that the progress of the "no-fault" schemes in New Zealand and Sweden should be studied and assessed so that the

experience could be drawn upon if, because of changing circumstances, it was decided to introduce a “no-fault” scheme for medical accidents in this country.

Vaccine damage

The Commission did not think it right to try to distinguish one severely disabled child from another to produce a situation where two children have the same needs, but one is compensated and the other is not. Vaccine-damaged children were therefore considered with other severely disabled children irrespective of the cause of disablement.

The Commission concludes that vaccine-damaged children should be entitled to the benefit they propose for severely disabled children but they should have an additional remedy in the field of tort.

There is a special case for paying compensation for vaccine damage where vaccination is recommended by the State and is undertaken to protect the community. The Government or local authority concerned should thus be strictly liable in tort for serious damage suffered by anyone, adult or child, as a result of such vaccination.

The Commission says that it had concluded that there was a special case when the Government asked for its views last year but it was unable to produce an interim report until it had looked at the problem of vaccine damage in the light of its remit as a whole.

In the light of this conclusion the Secretary of State for Social Services had said last year that the Government had decided to accept in principle that there should be a scheme of payments for the benefit of those who were seriously damaged as a result of vaccination, and that it should apply to existing as well as to new cases.

The Commission was conscious of the view that special compensation provision for vaccine damage might act as a deterrent to vaccination, on the grounds that it would imply that there must be a real danger.

But there was the opposite view, which the Commission shared, that the Government must be confident about the safety of vaccination before it would make such a provision. It naturally hoped that any increase in litigation resulting from their recommendations, and any attendant publicity, would not have an adverse impact on the future vaccination programme.

Ante-natal injury

Ante-natal injury was specifically included in the Commission’s terms of reference because of the thalidomide tragedy. It was often impossible, however, to distinguish the results of ante-natal injury from other congenital defects. Congenital defects account for 90 per cent of all severe disability among children.

As the cause of congenital malformation could rarely be estab-

lished it was not practical to devise a separate scheme for those cases which were within the terms of reference. Children who may have been injured before birth should be considered as part of the problem of compensation for all children who are severely handicapped.

The introduction of strict liability for products would provide a remedy for ante-natal injury if it could be proved to have been caused by "defective" drugs.

The tort action provided under the Congenital Disabilities (Civil Liability) Act 1976 should be retained but its operation should be restricted because there are grave objections to the tort action within the family in the sphere of ante-natal injury.

The child should not normally be allowed to sue either of its parents.

The liability for pre-conception injury in Scotland — where there had been no legislation on ante-natal injury — should be limited to the same extent as the rest of the United Kingdom.

Children

It is estimated that there are about 100,000 severely handicapped children — 90,000 suffering from congenital disability; 1,000 to 2,000 disabled through post-natal injury and 8,000 who have suffered from disabling diseases acquired after birth such as meningitis, leukaemia and epilepsy.

As all children who are severely handicapped should be treated in the same way, no matter the cause of their handicap, the Commission recommends that a special benefit for severely handicapped children should be introduced. There is no obvious source of finance related to the causes of handicap so that the cost would have to be borne by the Exchequer.

Those children with a severe disability needed all possible assistance if they were to achieve maximum potential later in life and the whole family may suffer if support was not available.

The "no-fault" provision at present available was not adequate and it is recommended that an addition to child benefit should be paid to parents and guardians of all severely handicapped children.

The new benefit

The new allowance would be at the rate of £4 a week (at January 1977 levels), tax free, for severely handicapped children from the age of two. For preference it could be paid to the mother as an addition to child benefit. It would not be a substitute for local authority services.

The allowance would cease when the child became eligible for non-contributory invalidity pension at the age of 16, or at age 19 if receiving full-time education. It should be reviewed as the child grows as there may be some change in his condition.

Assessment of “severe handicap” should not depend solely on medical certification by doctors but should include assessment by members of other health care professions.

The Department of Health and Social Security should administer the benefit and lay down detailed procedure. There should be no avoidable delay in determining entitlement. There should be an appeal procedure of which parents should be told.

Mobility allowance

Attendance allowance and mobility allowance would still be payable where applicable.

The Commission recommends that the mobility allowance, now payable to children from the age of five, should be paid from the age of two.

It notes that the conditions of eligibility for the mobility allowance exclude substantial numbers of children with serious mobility problems such as uncontrolled epilepsy; severe asthma or cystic fibrosis; blind and deaf; overactive mentally handicapped children who require constant supervision.

It also understands that recent decisions on the award are in effect extending entitlement. It recommends that the conditions of eligibility for mobility allowance should be reviewed so as to help those children who may be technically mobile but whose mobility is subject to special difficulties.

Cost

The cost of the new allowance would be some £15m a year plus administration costs of £2m a year. To make mobility allowance payable at the age of two would cost £1m a year.

Even if compensation is available to all severely handicapped children on these lines it should still be possible to bring tort actions — subject to the off-setting of social security benefits.

Occupiers’ liability

No change was needed regarding injuries on other persons’ premises beyond that required to implement the Law Commission’s recommendations on “uninvited entrants”. These were trespassers, “authorised ramblers” and persons exercising a right of way (except those exercising a public right of way) who had not been dealt with under the Occupier’ Liability Act 1957, which covered “invited” (or permitted) visitors only and was applicable to England and Wales. The Law Commission had prepared a draft Bill which would supplement the 1957 Act covering “uninvited entrants” and this should be enacted. Similar steps should be taken in Northern Ireland.

No change is recommended for Scotland. The Bill proposed by the Law Commission would bring English Law broadly into line with Scottish law as it stands under the Occupiers’ Liability (Scotland) Act 1960.

Criminal injuries

The Commission recommends that the scheme for Great Britain should be put on a statutory basis. On the possibility of change, it does not think it necessary or appropriate to duplicate the thorough reviews recently completed in Northern Ireland and in an advanced stage in Great Britain. It confines itself to comment on the principles of the schemes.

It asks that the existing schemes should be reviewed in the light of its proposals on tort and the assessment of damages.

Animals

No major change was needed in the law in England, Wales and Northern Ireland but the Scottish legislation might be aligned with the rest of the United Kingdom by enacting provisions parallel to the Animals Act 1971.

The Dangerous Wild Animals Act 1976 and the Riding Establishment Acts 1964 and 1970 should be amended, either to specify practical limits to the compulsory third party insurance required, or to give the licensing authorities discretion to determine what is a satisfactory amount.

Exceptional risks

Some provision should be made for exceptional risks that could not adequately be covered under any of the categories they have considered. Strict liability should be imposed on controllers of things or operations which by their unusually hazardous nature require supervision because of their potential for causing death or personal injury, and those which, although normally safe, might cause serious and extensive casualties if they did go wrong.

In the first category would fall such things as explosives and flammable gases or liquids. In the second are such things as large public bridges, dams, major stores and stadiums and other buildings where large numbers may congregate.

There should be a statutory scheme under which certain things and operations would be listed in a statutory instrument, the controller of each becoming strictly liable for death or personal injury resulting from its malfunctioning.

The Minister making the Statutory Instrument should have the power, although not the duty, to lay down a requirement of compulsory insurance — and the minimum permissible to cover any particular case — for the risk to which strict liability applies.

Several recommendations are made (some by a majority) on the extent to which the parent statute should define the extent of strict liability and the possible defences and what should be left to be defined by the Statutory Instrument.

Compulsory insurance

At present, third party insurance cover was compulsory for employers and motorists, and also for nuclear installations, dangerous wild animals, riding establishments and oil pollution from merchant ships.

The Commission saw a number of practical difficulties to widening the scope of compulsory insurance. It recommends that consideration be given to imposing a new requirement in only two areas (a) for exceptional risks for which strict liability is imposed and (b) private aircraft.

Cost of the proposals

At January 1977 prices the combined effect of the Commission's proposals for compensation for personal injury would be to increase total compensation payments after five years by £5m a year. But as there would be an overall saving of £16m a year in the cost of administration there would be an initial reduction of £11m a year in the cost.

Ultimately, after 40 years, the combined effect would be to increase compensation payments by £51m a year. This increase represented nearly ten per cent of the £542m a year payable in injury compensation at present levels through both tort and social security. At the same time overall administration costs would decline by about £10m a year leaving a net increase in cost of £41m a year.

This concealed a change in the distribution of compensation costs. Costs in the state social security scheme (including administration) would ultimately increase by £130m a year (industrial injuries £58m; road £54m and severely handicapped children £18m). Tort compensation costs which were met, in the first instance, mainly by insurers in the private sector, would decrease by £86m a year and occupational sick pay by £3m.

The Commission says that despite the transfer of costs from the private to the public sector, broadly speaking, the costs of the proposed compensation arrangements would ultimately fall on the same groups as at present, namely employers and motorists, and would not involve a large increase in taxation.

The Commission is in no doubt that, looking at the whole picture, its proposals would result in a better balance in the distribution of the funds devoted to compensation for personal injuries and would give greater help to those who most need it.

The future

After its extensive enquiries and discussions, the Commission says that it naturally has views on ultimate objectives for the development of compensation.

“There are among us broadly three schools of thought which are indicated in the report only briefly as they go, in part, beyond the

scope of our terms of reference, and wholly beyond our conclusions and recommendations”, states the Commission.

Some of the members would welcome an eventual extension of no-fault compensation beyond the spheres of employment and road traffic to cover the other categories of injuries within their terms of reference (e.g. injuries arising from services) and those injuries which were outside their terms of reference (e.g. injuries in the home). The cost of introducing a much more extensive no-fault scheme covering both sickness and injury would be substantial but these members believed that it was a socially desirable objective.

Some of these members were also doubtful about the permanent value of the tort system of compensation as a means of supplementing what could be obtained from social security. In their view the tort system was too costly, too cumbersome, too prone to delay and too capricious in its operation to be defensible.

Other members hoped and believed that there would always be a role for the tort system, whatever happened to no-fault provision. They would argue that tort would remain uniquely well equipped for compensating the widest possible range of the particular losses suffered by a given individual; that despite the role of liability insurance, tort would continue to embody the socially valuable principle that, where a person negligently or intentionally caused injuries to another, amends should be made for the consequences of his fault; and that the continued existence of tort, would, of itself, be some safeguard against a system of total dependence on the State.

There were yet other members who took the view that, in the light of all the uncertainties, it would be best to wait until it was possible to assess the social and practical consequences of their proposals, in particular the road scheme, before trying to judge, even in principle, in which direction it would be appropriate to move next.

“But speculation about the future takes us well beyond our terms of reference”, concludes the Commission. “We have tried to deal with some of the most urgent problems which relate to compensation for death and personal injuries; and to provide a vantage point from which a number of possible routes into the future could be mapped out. On most of what we propose we are agreed”.

Pre-release preparation for jailed drug addicts

The Working Group on Treatment and Rehabilitation of the Advisory Council on the Misuse of Drugs in its report on “Drug Dependants within the Prison System in England and Wales” has urged the proper preparation for jailed drug addicts before being released if they are not to lose the value of enforced withdrawal and therapy in prison. The Report notes that “one of the great hazards of insufficiently prepared release is that the ex-drug dependant will immediately go back to taking drugs”.

The expression “drug dependants” is used to describe all those persons who are received into custody, including those remanded in custody before trial or sentence, who, in the opinion of a prison medical officer, are dependant upon drugs (excluding alcohol) whether or not the drugs are controlled by the Misuse of Drugs Act 1971 or are drugs controlled by that Act to which the Notification of Addicts Regulations apply; and the term “addict” refers to any person whose drug misuse meets the criteria for addiction as described in the Misuse of Drugs (Notification of and Supply to Addicts) Regulations 1973.

The recommendations of the Working Group deal with the statistics of such cases, their treatment and rehabilitation. The Report notes that treatment in prison based on withdrawal and therapy is often adhoc or scarce. It recommends more therapeutic units, greater use of the techniques utilised by the National Health Service and aid for prisoners on remand who can no longer use addiction clinics. In main, the Working Group emphasises on the importance of preparation for release, that is, the need for adequate arrangements to be made for the rehabilitation of persons who have been treated in prison for their drug-dependence when they are released in order to ensure that they do not relapse into drug-taking. According to the Report, one in ten addicts released dies of an overdose within days of freedom.

The main recommendations are as follows—

- (i) There should be adequate pre-release preparation for all prisoners dependent on drugs, starting at least one month and preferably three months before discharge, and that this preparation should include instruction on the effects of withdrawal and abstinence on tolerance.
- (ii) In order to improve the opportunities for an improved system of after-care, the Prison Service should allow the voluntary drug agencies easier and regular access to the prisons.
- (iii) The voluntary agencies under the co-ordinating aegis of NACRO (National Association for the Care and Settlement of Offenders) and SCODA (Standing Conference on Drug Abuse), and in co-operation with the Prison Service, should explore the possibilities of creating together an organisation specifically devoted to work with ex-drug dependants within prisons.
- (iv) In order to increase the opportunities for referral from the Prison Medical Service, the voluntary agencies, the Probation and After-Care Service and the DTCs (Drug Treatment Centre) should explore the possibility of a pilot therapeutic/supportive scheme for ex-drug dependant prisoners on release from an existing prison therapeutic unit; such a scheme should be monitored with a view to developing the support thereby offered on a wider scale.

- (v) The relevant local statutory authorities, either directly or on an agency basis, should use the opportunities provided by recent legislation or circulars to provide funds to supportive hostels and other housing opportunities for ex-prisoners with histories of drug dependence. The DHSS (Department of Health and Social Security) should issue a circular to health and social service authorities drawing attention to these new arrangements and specifically their value in the provision of supportive housing for vulnerable groups.
- (vi) Existing hostels including probation and bail hostels and those for ex-offenders should start to accept ex-drug dependents and SCODA and NACRO should provide the staff training necessary to facilitate such a development.
- (vii) The Prison Service should set up a pilot half-way hostel attached to a prison with an existing therapeutic unit, for ex-drug dependants on a pre-release basis, including opportunities for pre-release employment.
- (viii) More training opportunities within the Training Opportunities Scheme run by the Employment Services Agency should be made available to ex-dependent prisoners on release.

Reviews

International Digest of Health Legislation, Vol. 30, No. 3 (World Health Organization, Geneva: ix + 710 pp: Sw.fr.25 – Sw.fr. 90 per volume)

This Digest is published quarterly in two separate editions, English and French, and contains a selection of health laws and regulations and, from time to time, studies in comparative health legislation as well as a bibliographical section. Official publications and other documents forwarded by Member States in fulfilment of Article 63 of the Constitution of the World Health Organization constitute the principal source of material for the Digest. Texts of legislation are, according to their general interest, reproduced or translated in full or in extract form, summarised, or mentioned by their title. A subject index is published after the issue of the last number in each volume.

This issue reproduces the comparative survey by Rebecca J. Cook and Bernard M. Dickens of abortion laws in Commonwealth countries prepared for the Commonwealth Secretariat and included in the Secretariat's publication *Three Studies of Abortion Laws in the Commonwealth* [reviewed by Lesley Vick at (1979) 5 C.L.B. 581].

Law and Planned Parenthood by John M. Paxman (International Planned Parenthood Association, London: 116pp.: £3.00)

The author explains that the Handbook is designed to inform family planners, in a general way, about what the law has to say on subjects linked to family planning, to look briefly at the ways law restrains the development of family planning programmes, to explore the various imaginative approaches which have been adopted around the world to eliminate, overcome or avoid these restraints and to see how the law has been utilised to make freedom of choice in family planning matters possible. The emphasis is on working within the law by using known legal techniques, but the task of challenging and reforming the law is not ignored. On the whole, the Handbook is essentially a positive exercise which perceives the law as a facilitator rather than an inhibitor. The Handbook itself should be treated as a source book for ideas rather than a definitive treatise.

Chapters deal with legal and policy aspects of contraceptive information and services; voluntary sterilization and the law; pregnancy termination and the law; expanding the roles of health and auxiliary personnel in family planning; fertility regulation information and services for the adolescents; changing the status of women through law. A selected bibliography is included.

Three Studies of Abortion Laws in the Commonwealth by Mostyn P. Embrey, Victor Tunkel, Rebecca J. Cook and Bernard M. Dickens (Commonwealth Secretariat, London. 183 pp. £3.00 incl. postage) reviewed by Lesley Vick.

As noted in the preface to this valuable publication, medical technology in relation to family planning and the medical termination of pregnancy has in recent years outstripped the provisions of the law in many countries. In recognition of this, the Third and Fourth Commonwealth Medical Conferences, in 1971 and 1974 respectively, recommended that the Commonwealth Secretariat should gather information on the subject and study the legal and ethical aspects. Accordingly, three separate papers were commissioned by the Secretariat and tabled at the meeting of Commonwealth Law Ministers in August 1977 and later at the Commonwealth Medical Conference in November 1977. Now published as *Three Studies of Abortion Laws in the Commonwealth*, the report is intended to provide governments with information which may be of assistance in reviewing existing legislation and considering changes to that legislation.

The present state of abortion laws, including recent changes, was surveyed in 53 national and provincial jurisdictions within the 36 countries of the Commonwealth and in a number of associated states and dependencies. The information was analysed by the then Head of the Law Programme of the International Planned Parenthood

Federation (I.P.P.F.) and Professor Bernard Dickens, Faculty of Law of the University of Toronto, in consultation with the Medical Adviser and the Legal Division of the Commonwealth Secretariat. The two companion papers, prepared by Mostyn P. Embrey, M.D., F.R.C.S., F.R.C.O.G. of the Nuffield Department of Obstetrics and Gynaecology, John Radcliffe Hospital, Oxford and Victor Tunkel, Lecturer in Law at the University of London, deal with medical developments and legal initiatives respectively.

In their paper, "A Survey of Abortion Laws in Commonwealth Countries", Miss Cook and Professor Dickens show that most of the Commonwealth countries inherited their laws from the English Offences Against the Person Act of 1861 and English common law tradition. The English imprint has not been exclusive, however, since countries such as Malaysia have been influenced by Islamic law, while others fit into the Roman-Dutch common law tradition. A number of countries also retain the influence and jurisdiction of their indigenous customary law. Thus laws in Commonwealth countries range from apparent total prohibition to abortion on request, despite their common heritage. The word "apparent" is significant, because the survey shows that few, if any, Commonwealth countries are ready to recognise *de jure* the decriminalisation of medically conducted abortion that has occurred *de facto*. The report says that medical advances and social attitudes have rendered abortion safe and more widely acceptable, so that the atmosphere of crime has largely been removed. Abortion control is passing out of the realm of criminal law and into the realm of welfare law, which includes female health and fertility control. Legislation based on social justice, aiming to extend equal rights to health care to the poor, may be part of a social policy programme encompassing more than the enactment of legislation. In this context, abortion may not be the central focus but a residual part of a fertility control programme giving priority to family life education and instruction in contraceptive methods.

There are various societal pressures likely to lead to the inclusion of abortion in a wider health-care setting. It has been found repeatedly that legislation attaching sanctions to abortion does not prevent it, though poorer women may be denied access to safe medical procedures. The trend towards equal opportunity for women is making governments cognisant of their special needs and, based on current developments, the report predicts that the claims of women will lead to new thinking and new laws with a subsequent impact upon their status within society.

The report comments that the evolution of abortion law may be seen to follow a course moving from a prohibitive basic law to developed law, by means of a court ruling or an administrative declaration, and on to an advanced law stating grounds and conditions of lawful abortion. Once the scope of permitted abortion is defined, the justification for a separate abortion law may weaken

and it may be assimilated into the general law governing health and welfare. It is noted that legalising abortion does not necessarily make resources available for it and unless services which have been made legal in theory are made available in practice, the toll upon women's lives from illegal abortions will not be reduced.

Apart from the analysis of legal developments, the survey includes summaries of the Lane, Badgley and McMullin reports; three tables showing a) the legal indications for abortion in the various jurisdictions, b) when and by whom an abortion may be performed and c) the current government moves to assess their laws and the changes proposed by government and non-government agencies; three Commonwealth statutes and a sample Medical Termination of Pregnancy Bill (with commentary) which could be adapted to become law in all Commonwealth countries. The wealth of data contained in this report will undoubtedly prove as useful to governments, and others, as the authors hope. By identifying the various factors that those planning change may need to consider, indicating how individual jurisdictions have responded to particular issues and showing how certain laws have been found to operate the report will assist governments to respond to their individual needs and pressures in the light of knowledge and experience.

In his paper, "Developments in Medical Technologies for Fertility Regulation and Their Implications for Medical Legislation", Mostyn P. Embrey expresses concern that abortion laws have not kept pace with medical developments and thinking. The once clear difference between contraception and abortion has blurred due to modern techniques of fertility control. Most abortion laws were based on the understanding that conception takes place at the moment of the union of the sperm and the ovum but medical science today defines conception differently. Furthermore, the newer methods of pregnancy interception takes place at the very earliest stages of pregnancy, both before and after implantation is complete. The legal status of menstrual regulation (by vacuum aspiration or prostaglandins) needs clarification and the ambiguities are inadequately resolved by restrictive abortion statutes. Future developments on post-coital steroids (the "morning-after" pill) and several other methods which are being researched—notably biochemical blocking of hormone pathways and immunisation against hormones which suppresses fertility for a period and causes subsequent pregnancies to end in abortion—present further legal problems. As the author notes, these recent developments have implications of moral, ethical and legal importance and will necessitate a reappraisal of the law.

Mostyn Embrey's view is supported by Victor Tunkel in his paper "The Law Against Family Planning: A Commonwealth Survey". He states unequivocally that "the law is antiquated and largely ignored, but it remains the law and threatens to obstruct the new F.P. methods now being developed...present day family planning

practice, however ethical medically and desirable socially, is increasingly moving into the line of fire of the criminal law". In referring to the newer methods of pregnancy interception and dis-planting discussed by Mostyn Embrey, Mr. Tunkel finds the laws in the Commonwealth interpretable in two ways. Some restrict family planning while others, mainly through administrative provisions, actively promote it. In general, however, even the latter type is so imprecise and vague that they are unhelpful and could be troublesome to medical practitioners. Conversely, of course, laws which seem to restrict are often unenforceable. Having identified these problems, the paper then canvasses some suggestions for reform. Apart from complete decriminalisation, the possibility of legalisation by reference to a number of factors, including the stage of pregnancy, the means used, the practitioner and function, is discussed. These possibilities, and legalisation through lack of evidence, are not seen by the author as likely to suffice in isolation. A combination of approaches, varied according to the present and foreseeable needs of a particular country, seems most desirable. In noting that it is doubtful whether there is any Commonwealth country where post-conceptive family planning is not already being practised, Mr. Tunkel reiterates the view that runs through the three papers—"Forward-looking family planning policy needs positive help from a forward-looking law".

Lesley Vick

The law and mental health: harmonizing objectives by W. J. Curran and T. W. Harding (World Health Organisation, Geneva: 161 pp.).

This report, which was originally published in the *International Digest of Health Legislation*, is concerned with ways in which the law can be used to promote more effective and humane responses to mental disorders. A large number of countries are surveyed, guidelines developed for the assessment of existing legislation, and an account given of alternative approaches which it is hoped will generate fresh thinking and creative drafting in future legislation.

New abortion law

The World Health Organisation's translation of Italy's new abortion law, one of the most liberal in Western Europe, is available in the June 1978 issue of *Law File*, published by the International Planned Parenthood Federation, 18-20 Lower Regent Street, London SW1Y 4PW, United Kingdom. *Law File*, which appears regularly, records developments around the world in the field of family planning and related issues (e.g. status of women, mothers and children, primary health care etc.).

Beyond the interests of the child by Joseph Goldstein, Anna Freud and Albert J. Solnit (Macmillan Publishing, New York: xiv + 170 pp: \$2.45).

The book examines child placement and child-parent relationships and sets out guidelines and their implications for laws concerning the placement of children. It culminates in the following model statute, for which the remainder of the book serves as a commentary—

ARTICLE 10. DEFINITIONS

PARA. 10.1 BIOLOGICAL PARENTS

The biological parents are those who physically produce the child.

PARA. 10.2 WANTED CHILD

A wanted child is one who receives affection and nourishment on a continuing basis from at least one adult and who feels that he or she is and continues to be valued by those who take care of him or her.

PARA. 10.3 PSYCHOLOGICAL PARENT

A psychological parent is one who, on a continuing day-to-day basis, through interaction, companionship, interplay, and mutuality, fulfills the child's psychological needs for a parent, as well as the child's physical needs. The psychological parent may be a biological (Para. 10.1), adoptive, foster, or common-law (Para. 10.4) parent, or any other person. There is no presumption in favour of any of these after the initial assignment at birth (Para. 20).

PARA. 10.4 COMMON-LAW PARENT-CHILD RELATIONSHIP

A common-law parent-child relationship is a psychological parent (Para. 10.3)—wanted child (Para. 10.2) relationship which developed outside of adoption, assignment by custody in separation or divorce proceedings, or the initial assignment at birth of a child to his or her biological parents (Para. 20.1).

PARA. 10.5 CHILD'S SENSE OF TIME

A child's sense of time is based on the urgency of his or her instinctual and emotional needs and thus differs from an adult's sense of time, as adults are better able to anticipate the future and thus to manage delay. A child's sense of time changes as he or she develops. Intervals of separation between parent and child that would constitute important breaks in continuity at one age might be of reduced significance at a later age.

PARA. 10.6 LEAST DETRIMENTAL AVAILABLE ALTERNATIVE

The least detrimental available alternative is that child placement and procedure for child placement which maximizes, in accord with the child's sense of time (Para. 10.5), the child's opportunity for being wanted (Para. 10.2) and for maintaining on a continuous, unconditional, and permanent basis a relationship with at least one adult who is or will become the child's psychological parent (Para. 10.3).

ARTICLE 20. INITIAL PLACEMENT

PARA. 20 PLACEMENT OF CHILD

At birth, a child is placed with his biological parents (Para. 10.1). Unless other adults assume or are assigned the role, they are presumed to become the child's psychological parents (Para. 10.3).

ARTICLE 30. INTERVENTION TO ALTER A CHILD'S PLACEMENT

PARA. 30.1 STATE POLICY OF MINIMIZING DISRUPTION
It is the policy of this state to minimize disruptions of continuing relationships between a psychological parent (Para. 10.3) and the child. The child's developmental needs are best served by continuing unconditional and permanent relationships. The importance of a relationship's duration and the significance of a disruption's duration vary with the child's developmental stage.

PARA. 30.2 INTERVENOR

An intervenor is any person (including the state, institutions of the state, biological parents, and others) who seeks to disrupt a continuing relationship between psychological parent (Para. 10.3) and child or seeks to establish an opportunity for such a relationship to develop. Upon such interventions the court's decision must secure for the child the least detrimental available alternative (Para. 10.6).

PARA. 30.3 BURDEN ON THE INTERVENOR

A child is presumed to be wanted (Para. 10.2) in his or her current placement. If the child's placement is to be altered, the intervenor, except in custody disputes in divorce or separation, must establish *both*:

- (i) that the child is unwanted, *and*
- (ii) that the child's current placement is not the least detrimental available alternative (Para. 10.6).

In custody disputes in divorce or separation, the intervenor, that is the adult seeking custody, must establish that he or she is the least detrimental available alternative (Para. 10.6).

PARA. 30.4 CHILD'S PARTY STATUS

Whenever an intervenor seeks to alter a child's placement the child shall be made a party to the dispute. The child shall be represented by independent counsel.

PARA. 30.5 FINAL UNCONDITIONAL DISPOSAL

All placements shall be unconditional and final, that is, the court shall not retain continuing jurisdiction over a parent-child relationship or establish or enforce such conditions as rights of visitation.

PARA. 30.6 TIMELY HEARING AND APPEAL

Trials and appeals shall be conducted as rapidly as is consistent with responsible decisionmaking. The court shall establish a timetable for hearing, decision, and review on appeal which, in accord with the specific child's sense of time (Para. 10.5), shall maximize the chances of all interested parties to have their substantive claims heard while still viable, and shall minimize the disruption of parent-child relationships (Para. 30.1).

Australia

Legal and Social Aspects of Human Artificial Insemination: a bibliography of items written after 1970 compiled by Roy Jordon (13 pp.)

This bibliography containing a listing of books, journal articles, and newspaper and magazine articles (223 items) has been published

by, and is available from, the Australian Attorney-General's Department, Canberra.

The Second Symposium on Law and Justice in the Australian Capital Territory

The papers from the Symposium held in Canberra, Australia, in March 1977 have now been published and are available from the Symposium Convenor, Mr. J. K. Bowen, Assistant Crown Prosecutor, 4th Floor, QANTAS House, London Circuit, Canberra, A.C.T. 2601.

The papers include —

- (i) problems associated with the institution and conduct of prosecutions in the Australian Capital Territory, by K. E. Enderby, QC;
- (ii) the conduct of prosecutions in the Australian Capital Territory, by A. J. Oldroyd;
- (iii) blind justice: an exercise in press censorship by Australia's economic-legal system, by Ian Mathews;
- (iv) freedom of information v. privacy, by Mr. Justice Kirby;
- (v) the role of the psychiatrist in the criminal trial, by A. A. Bartholomew;
- (vi) an examination of the laws of the Australian Capital Territory and proposals for reform, by Mr. Justice Blackburn;
- (vii) reform of the investigation and trial of rape, by H. Coonan;
- (viii) the impact of legalised casinos in Canberra, by J. McCrudden;
- (ix) the role of the ombudsman, by Sen. John Knight.

Deterrence and the drinking driver by Roman Tomasic (Law Foundation of New South Wales; 77 + xiii pp).

The paper re-examines a major social problem and attempts to determine whether it is possible to classify the drinking-driving population and so establish how particular drivers or groups of drivers will respond to the threat and the imposition of punishment, and next to non-punitive measures. It also argues that the problems of many drinking drivers should be defined as community and health problems rather than as traffic problems, and that the diversionary approach to offenders is more appropriate and more likely to be successful as a deterrent than wholly punitive measures.

Drugs, alcohol and community control by Roman Tomasic (Law Foundation of New South Wales; 248 pp).

Two studies in this series have been noted at (1977) 3 C.L.B. 334, namely *Deterrence and the drinking driver* and *Bail and pre-trial release—strategies and issues*. This, the third, brings together a wide range of materials to illustrate Australian approaches to alcoholism

and drug dependence and contrasts these with developments currently taking place to reform legal systems, particularly within the U.S.A. The author sees a need for greater community involvement in alternatives needed to replace those aspects of the legal system which have apparently failed to respond adequately to the needs of individual alcoholics and drug users.

Family planning and the law (2nd edition) by H. A. Finlay and J. E. Sihombing (Butterworths Pty Ltd, Australia: xii + 228 pp).

The book reviews Australian legislation, both State and Federal, on the distribution and marketing of contraception, abortion, sterilisation, adoption, artificial insemination, embryo transplantation and fertility drugs.

Since the first edition appeared there has been the comprehensive symposium on "Family planning and the law" held in Sydney, and the authors have included the papers from this in the second half of the book, adding to its breadth, interest and usefulness.

Canada

Psychiatry and the Judicial Process: A Bibliography compiled by Robert J. Menzies (Centre of Criminology, University of Toronto: 55 pp: \$2.50)

This bibliography was compiled as a component of a larger study on the Mentally Disordered Offender, conducted for the Canadian Department of Justice by Dr. Christopher D. Webster. Upon a preliminary survey of the literature, it became apparent that few attempts had been made to accumulate and classify the burgeoning research in the field of forensic psychiatry. The area cross-cuts such a wide spectrum of disciplines and orientations that ready access to relevant research data is often impossible. The Centre is attempting to bridge that gap by means of this bibliography.

Subject areas include general papers on policy and legislation; studies of psychiatric remands; the role of the psychiatrist in determining fitness (competency) and insanity (criminal responsibility); issues relating dangerousness to mental illness; and considerations of ethics and civil liberties.

The Silent System: An Inquiry into Prisoners who Suicide: an Annotated Bibliography by Brian E. Burtch and Richard V. Ericson (Centre of Criminology, University of Toronto: 113 pp: \$5.00)

It is generally known that the rate of suicide in penal institutions exceeds that of the general population. Notwithstanding substantial media coverage on prisoner suicides as well as renewed academic and clinical interest in the prediction and prevention of inmate suicide, this subject has remained largely unexplored.

This report is the first major study of prisoner suicides in Canadian penal settings. It is based upon an official document

analysis of 96 inmates who committed suicide in four maximum-security penitentiaries between 1959 and 1975. Background demographic factors, offence history, length of confinement, stage of confinement, location in prison, and previous psychiatric history of these inmates are considered. Where possible, the suicide sample is compared on these characteristics with a sample of 1,383 inmates in four maximum-security penitentiaries in 1977. Official responses to distressed inmates are appraised in terms of emergency measures, clinical resources, and adequacy of post mortem investigations. An annotated bibliography briefly reviews selected books and articles on inmate suicide.

The Canadian Patients Book of Rights by Lorne E. Rozovsky (Doubleday Canada Ltd: \$8.95 paperback, \$14.95 hardback)

The publication is a comprehensive consumer's guide to Canadian Health Law containing all the information needed to secure a good medical care or to deal with difficult medical situations. Topics covered include a Patients' Bill of rights; hospital insurance and medical care; the rights to a doctor of one's choice; consent to treatment; standard of care and negligence; who is responsible for whom?; the patient's property; medical records and confidentiality; abortions; mental illness and communicable disease; death; after you are gone; what do we mean by law?; why do patients sue?; and to whom do you complain?

Canadian Hospital Law 2nd Edition by Lorne Rozovsky (Canadian Hospital Association, Ottawa: \$Can. 12)

This work, by one of Canada's leading authorities on health law, contains up to date information on health care law in Canada. Topics covered include: the lawyer; responsibility to a patient; consent to treatment; negligence; privileges of medical staff; patients' records; medical termination of pregnancy; the patient's property; transplants and human tissues; wills.

Canadian Law Reform Commission publications

A number of reports, working papers and studies of the Law Reform Commission of Canada are available, free of charge, from the Canadian Law Reform Commission (130 Albert St, Ottawa Ontario K1A 0L6).

The publications include —

- (i) Law Reform Commission's Fifth Annual Report 1975–1976 (Cat. No. J31–1976);
- (ii) Limits of criminal law, Working paper No. 10 (Cat. No. J32–1/10–1975);
- (iii) Imprisonment and release, Working No. 11 (Cat. No. J32–1/11–1975);

- (iv) The criminal process and mental disorder, Working Paper No. 14 (Cat. No. J32-1/14-1975);
- (v) Commissions of inquiry, Working Paper No. 17 (Cat. No. J32-1/17-1977);
- (vi) Federal court, Working Paper No. 18 (Cat. No. J32-1/18-1977);
- (vii) Evidence, Report to Parliament (Cat. No. J31-15/1975);
- (viii) Guidelines on dispositions and sentencing in the criminal process, Report to Parliament (Cat. No. J31-16/1975);
- (ix) Our criminal law, Report to Parliament (Cat. No. J31-19/1976);
- (x) Expropriation, Report to Parliament (Cat. No. J31-17/1976);
- (xi) Mental disorder in the criminal process, Report to Parliament (Cat. No. J31-18/1976);
- (xii) Family law, Report to Parliament (Cat. No. J31-20/1976);
- (xiii) Sunday observance, Report to Parliament (Cat. No. J31-21/1976);
- (xiv) The Immigration Appeal Board, Administrative Law Series Study Papers (Cat. No. J32-3/13);
- (xv) The Atomic Energy Control Board, Administrative Law Series Study Papers (Cat. No. J32-3/15);
- (xvi) The parole process, Administrative Law Series Study Papers (Cat. No. J32-3/14);
- (xvii) Unemployment Insurance Benefits, Administrative Law Series Study Papers (Cat. No. J32-3/16).

Sri Lanka

Legal Dimensions of Population Dynamics: Perspectives from Asia by D. C. Jayasuriya (Associated Educational Publishers, Sri Lanka: 174 pp.)

Population policy and development problems in the Asia region have received considerable attention from demographers and social scientists, but information on the legal aspects of population dynamics and comparative surveys have largely been lacking. This book is intended to fill this void by analysing salient aspects and taking examples from selected countries in the region.

Narcotics and drugs in Sri Lanka: socio-legal dimensions by D. C. Jayasuriya (Associated Educational Publishers, Mount Lavinia, Sri Lanka: 219 pp).

The book traces the historical development of the law and of control mechanisms relating to narcotics and drugs in their social, economic and political perspectives.

Uganda

The Venereal Diseases Decree 1977 (published by the Law Reform Commission, Ministry of Justice, Kampala, Uganda: 12 pp: Shs. 5)

An explanation to the public of a measure to combat sexually-transmitted diseases.

United Kingdom

Suicide guide

A 30-page booklet titled "Guide to Self-deliverance" detailing five ways to commit painless suicide has been compiled by EXIT, the Society for the Right to Die with Dignity or the voluntary euthanasia group. It contains a great deal of information specifically aimed at ensuring that those who attempt to kill themselves do so efficiently. Controversy over its publication, which according to the Society would be available to people who have been members of EXIT for three months, led to a split in the 9,000 membership.

The argument in favour of its availability is based, first, on the principle of "the right to die" and, second, that if a person has already decided to put an end to his life, he should be entitled to the necessary information on how to go about his self-destructive act so as to achieve certain success. That philosophy supposes that people who contemplate suicide to do calmly and dispassionately, taking all factors for and against into consideration, and coming to the conclusion that, on balance, they would prefer to be dead rather than alive.

Those opposed to its publication argue that suicide is more often an irrational act and emphasise its dangers if it gets into the hands of persons suffering from a temporary or pathological emotional distress, thus resulting in unnecessary deaths.

The booklet has been published in Scotland after EXIT members were told they would not be breaking the law. In England, however, the executive committee decided against publication after being told there would be a risk of committee members being prosecuted for contravening the Suicide Act 1961, which makes it an offence, punishable with 14 years' imprisonment, to aid or abet a suicide. In 1961, attempting to commit suicide ceased to be a crime, but aiding and abetting another to take his or her life however, has remained an offence, punishable with up to 14 years' imprisonment (although no sentence approaching that severity has in fact been imposed).

The Human Rights Review (Oxford University Press in association with the British Institute of Human Rights: twice yearly: edited by J. E. S. Fawcett)

Since we noted the first appearance of this journal [at (1976) 2 C.L.B. 469], the issues for Autumn 1976 and Spring 1977 have appeared. These have perceptively broadened the areas of interest, and the journal has quickly assumed a major place in human rights literature.

Items noted in these issues include parliamentary privilege; Race Relations Board; ombudsman; consent to abortion; prison rules; congenital disabilities; computerised data banks; psychiatric

detention; deserters; remand; defamation; privacy; police power; Community Land Act; inheritance; insurance; press freedom; trade union rights; employment protection; defence counsel; capital punishment; immigration officers; military discipline; indecency; sterilisation; electronic surveillance; sex education; homosexuals and the young; incitement to disaffection; shop stewards; and appeals against deportation orders.

Articles include "The law and fundamental rights in the United Kingdom: the law and the British constitution" (*Anthony Lester*), "Protection of human rights" (*U.K. Home Secretary*), "UN and Human Rights in Chile" (*Felix Ermacora*), and "The European Convention on Human Rights, Article 32: what is wrong?" (*Anthony Morgan*).

Documents reproduced include individual and social rights as described and protected in the Constitution of Greece; the UN Declaration on Protection from Torture; the reservations and interpretative statements on behalf of the United Kingdom in respect of the International Covenant on Civil and Political Rights; and President Carter's Executive Order to regulate the foreign intelligence agencies of the United States.

Influence of Litigation on Medical Practice edited by Clive Wood (Academic Press, London: 215 pp: £10.20p).

The book records the proceedings of a Conference held in London and jointly sponsored by the Royal Society of Medicine and the Royal Society of Medical Foundation Inc. Participants included distinguished medical practitioners from both Britain and the United States, prominent lawyers, and experts in the field of health administration and medical insurance. The volume includes a précis of discussions as well as the text of the papers presented.

One aspect of the enormity of the problem is shown by the following figures: In the United States the number of suits filed alleging medical malpractice doubled in the five years from 1970 to 1975 while the average jury award increased six times over in the same period. At the same time some 36 per cent of the spiralling rise in the cost of medical care has been attributed to the costs of malpractice claims and suits. Yet for all the millions of dollars spent in the malpractice area, recent estimates suggest that as little as 18 to 20 per cent of the total malpractice dollars actually reach an injured patient. However 80 per cent is consumed by the system itself—by lawyers, insurance companies, and expert witnesses.

This provoked the comment that "a more unfortunate system could not have been devised by ten madmen or ten law professors (which may be the equivalent) working overtime for 20 years . . . If we are to deal with the problems of both compensating the patient and eliminating the incompetent practitioner, we must do away with

the fault system itself. This means that we must compensate the patient on a no-fault basis for untoward results. This would not prove extremely costly, since if we tripled the amount of money we are currently paying to patients, we could still cut insurance premiums by approximately 40 per cent. As far as weeding out the incompetent physician is concerned, this cannot be done by a tort or fault system, but must be done by a vigorous system of licensing carried out by the medical profession itself to eliminate the incompetent physician."

In discussion on the paper, the point was made that New Zealand already has a no-fault plan which seems to be working effectively.

In the field of multiple drug therapy, an American consultant in a paper entitled "Is There a Standard of Care?" noted that physicians in the United States last year wrote about two billion prescriptions for some 22,000 drugs with information about side effects and toxic reactions well represented by a litany of warnings in the Physicians Desk Reference pharmacology text books, and the medical literature. The chance recognition of unexpected drug interactions is slow and inefficient.

Space precludes a full review of this fascinating exchange of experience. The nagging doubt in Britain is noted—that litigation for negligence may be an American export which will adversely affect Britain lives and the practice of medicine in that country. Plainly the British concern is also a Commonwealth concern. For this reason, the volume could not be more relevant.

Recent Articles

The drug abuse problems: international policy (prepared by the UN Secretariat) (1978) 34 *International Review of Criminal Policy* 43.

The right to parenthood (*Patricia A. Wright*) (1979) 2 *Family Law Review* 173. In an area dealing with law and the control of life, values and morals are of the utmost concern.

Death: a medical dilemma: a legal answer (*Alan C. Hoffman and Mark Van Cura*) (1979) 3 *Legal Medical Quarterly* 110.

The development of Commonwealth abortion laws (*Bernard M. Dickens and Rebecca Cook*) (1979) 28 *International and Comparative Law Quarterly* 424.

Mental health patients' rights and the European Human Rights Convention (P. T. Muchlinski) (1980) 5 *Human Rights Review* 90.

Travel and communications—their relation to health problems in Small States (*E. R. Walrond*) (1980 March/April) 6 Bulletin of Eastern Caribbean Affairs 27.

Australia

Injuries to unborn children (*Peter F. Cane*) (1977) 51 Australian Law Journal 704.

Law and the battered wife (*Anwar Khan and Jeanette Hackett*) (1978) 3 Legal Service Bulletin 5.

Damages in contract for mental distress (*P. H. Clarke*) (1978) 52 Australian Law Journal 626.

Medico-legal aspects of family planning (*Jan E. Black*) (1978) 2 Legal Medical Quarterly 198.

Canada

Canadian Abortion Law: obstacle for safer management of Canadian women (*Dr. C. A. Douglas Ringrose*) (1978) 2 Legal Medical Quarterly 97. Canadian abortion laws were formulated at a time when medical technology and knowledge of reproduction were relatively primitive by present-day standards.

Liability to the unborn (*L. C. Green*) (1978) 2 Legal Medical Quarterly 82.

Drug regulation in Canada (*Willem Wassenaar*) (1978) 2 Legal Medical Quarterly 209.

Control of Living Body Materials (*Bernard M. Dickens*) (1977) 27 University of Toronto Law Journal 142.

The article looks at countries whose medical technologies are skilled enough to undertake human organ transplantation and which have legislation governing express post mortem gifts of body materials.

Establishing the cessation of life (*David A. Frenkel*) (1978) 2 Legal Medical Quarterly 162.

Children's right and the family unit (*Frank Bates*) (1978) 1 Family Law Review 242.

Child abuse and the social worker: rights of the parents (*Jeff Rasley*) (1978) 1 Family Law Review 247.

The ectogenetic human being: a problem child of our time (*Bernard M. Dickens*) (1979 – 80) 18 *University of Western Ontario Law Review* 241.

Psychiatry, the inmate and the law (*A. W. Cragg*) 3 *Dalhousie Law Journal* 510. An analysis of the role of psychiatry in the treatment of offenders.

Jamaica

A Modern approach to mental health legislation in Jamaica (*Frederick W. Hickling*) (1977) *West Indian Law Journal* 55.

The legal and psychiatric implications of ganja use in Jamaica (*Frank Knight*) (1979 October) *West Indian Law Journal* 52.

New Zealand

Psychiatric testimony: the ultimate issue rule and the rule in Rowton's case (*C. B. Cato*) [1980] *New Zealand Law Journal* 288.

United Kingdom

Compensating vaccine-damaged children (*Harvey Teff*) [1977] *New Law Journal* 904.

Switching off life support machines—the legal implications (*Ian McColl Kennedy*) [1977] *Criminal Law Review* 443.

Children at risk and care proceedings (*S. Christie*) [1980] 130 *New Law Journal* 280.

Some problems of evidence obtained by hypnosis (*Lionel Howard and Andrew Ashworth*) (1980) *Criminal Law Review* 469.

Psychopaths in the criminal process (*Andrew Ashworth and Joanna Shapland*) (1980) *Criminal Law Review* 628.

Brain death: a case for legislation? (*Alexander McCall Smith*) (1980) 25 *Journal of the Law Society of Scotland* 113.

The case of the mentally abnormal offender (*J. A. Baird*) (1980) 25 *Journal of the Law Society of Scotland* 169.

Announcements

Coming Events

13–18 September 1981—The International Congress on Drugs and Alcohol, to be held at Jerusalem, Israel. Topics on the agenda include (a) the drug user: individual and systematic issues; (b) drugs, medicines and socially accepted substances; (c) chemical coping and chemical ecstasy: challenge to religion, ethics and society; (d) drug use/misuse: theories, facts and unresolved issues; (e) drug use/misuse intervention: treatment, prevention and education; (f) chemical coping: individual, social, economic and political issues; (g) drug use/misuse research: methodologies, models and strategies; (h) ideological considerations; (i) social pharmacology; (j) the internal and external environment of drug use/misuse; (k) substance use; (l) leisure and chemical coping; (m) chemical control and human and societal functioning; (n) cultural aspects of chemical coping, literature, art, mass media.

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Printed and published by
The Commonwealth Secretariat

May be purchased from
Commonwealth Secretariat Publications
Marlborough House
London SW1Y 5HX

ISBN 0 85092 207 0

ISBN 978-1-84859-328-2



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