

THE COMMONWEALTH SECRETARIAT

NOTE TO THE MEDICAL ADVISER TO THE COMMONWEALTH
SECRETARY-GENERAL, PROFESSOR SIR KENNETH STUART

THE COMMONWEALTH SECRETARIAT, BIOETHICS AND LEADERSHIP

The Hon. Mr. Justice M.D. Kirby, C.M.G.*
Chairman of the Australian Law Reform Commission

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PURPOSE OF PAPER

1. The purpose of this paper is to explore briefly the possibility of the Commonwealth Secretariat taking a more active leadership role in assisting Commonwealth countries with law reform as it affects medico-legal developments. It arises out of discussions held among participants at the Joint Commonwealth Secretariat/WHO/UNICEF Workshop on Implementation of the International Code on Marketing of Breastmilk Substitutes held at Harare, Zimbabwe, 17-21 January 1983. The paper argues for the proposition that the Commonwealth Secretariat could and should play a more active role in providing guidance to lawmakers and policy administrators throughout the Commonwealth concerning legal, ethical and other implications of rapid developments in medical technology.

2. In his address to the Fifth Commonwealth Law Conference in Edinburgh on 29 July 1977, the Commonwealth Secretary-General said:

Commonwealth lawyers - heirs to this great tradition of fashioning a new jurisprudence out the rigidities of the old - should be in the forefront of the movement that will fashion a new world legal order for the 21st Century. Great challenges are already at hand in frontier areas...[T]hese challenges will only be met by new systems and structures when we make the essential conceptual breakthrough about the nature of the human condition; when we acknowledge that the vision of one world has become the reality of one human community. It is worth remembering that Lord Atkin's catalytic formulation of the duty to take care could only have entered a jurisprudence already sensitised to the concept of 'neighbour'.¹

* The views expressed are personal views only.

3. It is the view of this paper that this call for neighbourly co-operation in the law is specially relevant to medico-legal problems because, whatever other differences - institutional, cultural, religious, legal or ideological - may exist within the Commonwealth of Nations, the human body is one and the same. As law and policy affects the human body, identical or almost identical problems are raised and answers must be provided.

COMMON FEATURES

4. The Commonwealth Secretariat is in an advantageous position to provide leadership in medico-legal matters. The tradition of medical and legal education is still very similar throughout the Commonwealth of Nations. Professional standards are similar. The jurisprudence of Commonwealth countries is, almost exclusively, traced to England. The mode of legislative drafting (with all its faults) is similar and familiar through the Commonwealth. The traditions of administration are similar. The institutions of governments, including the courts, are similar. The role, including the creative role, of the judiciary is similar. The establishment of law reforming agencies is common throughout the Commonwealth.

5. Law reforms adopted in one independent Commonwealth country are frequently copied in others. In this way, the reform of divorce law adopted in England has now spread to Australia, New Zealand and other Commonwealth countries. The borrowing of reforms is facilitated by the work already done by the Legal Division of the Commonwealth Secretariat, not least in the regular publication and widespread distribution of the Commonwealth Law Bulletin: an invaluable source of information on legislative, case law, law reform and other reports. The existence of medical and legal advisers within the Commonwealth Secretariat make it appropriate that there should be enhanced liaison between them in order to grapple effectively with the proliferating medico-legal issues of our time.

6. The Commonwealth Secretariat is in an advantageous position when compared to other international institutions.

- * The United Nations Organisation embraces countries with quite different legal traditions and sharing no common legal language.
- * The Council of Europe includes few of the Member countries of the Commonwealth and excludes the overwhelming majority.
- * The Organisation for Economic Co-operation and Development includes only the developed countries of the Commonwealth (Australia, Canada, New Zealand and the United Kingdom).

Accordingly no international institution is in a better position than the Commonwealth Secretariat to provide relevant leadership in addressing the common problems presented to generally similar legal systems by common advances in medical science and technology.

THE PROBLEMS ILLUSTRATED

7. In Australia, a start has been made on tackling the bioethical dilemmas posed by some of the recent technological advances affecting medicine. The Australian Law Reform Commission in 1977 produced its report Human Tissue Transplants (ALRC 7). That report is the basis of legislation enacted in the States of Queensland and Western Australia and in the Australian Capital Territory and the Northern Territory of Australia. A Bill is before the Victorian Parliament. Legislation based on the report has been promised in South Australia and New South Wales. The report dealt with such vexed medico/legal/ethical issues as:

- * the definition of 'death' in terms of brain function;
- * the provision of an 'opt in' or 'opt out' system for human tissues and organs for transplantation purposes;
- * the donation of paired, non-regenerative vital organs by minors to siblings;
- * the power of the surviving family to override donation requests of deceased family members;
- * the power to retain tissues and organs from Coroners' cadavers and other postmortem material for general social use e.g. in the preparation of serum.

The issues, some of which are mentioned above, were highly controversial, sensitive and subjects liable to be put to one side by the democratic lawmaking process for those reasons. The methodology of the Australian Law Reform Commission in tackling the project is described elsewhere.² It is sufficient to say that it involved the use of interdisciplinary consultants, public hearings and thorough exposure of issues to the public media before a reasoned report with draft legislation was presented to political process.

8. There are many other issues of a similar kind now facing developed countries. Such issues will proliferate. In due course, they will face developing countries as well. They include, to mention but a few:

- * the law and in vitro fertilization³;
- * the law and euthanasia;
- * the law and treatment of children born severely retarded or deformed⁴;
- * abortion and the use of foetal tissue for experiments and therapy;
- * cloning and the artificial development of human organs;
- * genetic engineering and experimentation.

9. It is important to avoid the 'myths of legal homogeneity'.⁵ It is important to acknowledge the differing urgency of tackling such problems in different Commonwealth countries. It is important to recognise the different religious and

cultural backgrounds that will affect legal, professional and institutional responses to such problems. The political situation in different countries is also relevant. But the issues raised are of the greatest complexity. They require the attention of the finest minds (medical, legal, philosophical, sociological, etc.) within the Commonwealth of Nations. The commonality of the human body and the high similarity of the legal order provide opportunities for attention to the problems on an international level that should not be lost. Whilst the provision of reports prepared in one country and circulated throughout the Commonwealth is useful (and is done), it is no substitute for the pooling of common talent and the exchange of experience, ideas and suggestions. The value of the Harare Conference will be enhanced by the attention that could be focused on two draft Bills designed to implement the WHO Code on breastmilk substitutes. The draft Bills help to concentrate attention on the practical issues which lawmakers and policy makers have to face in using the law, with its distinctly limited role, as a means to achieve social policies and to educate and influence public opinion. The model legislation may be picked up by no Member country. But it is likely to provide a basis for the consideration of domestic laws in some Member countries. The provision of the model legislation was a most useful initiative and one upon which the Commonwealth Secretariat is to be congratulated. The use of draft legislation to:

- * focus attention on practical problems of implementation of general policies;
- * overcome the practical impediment to action often existing in Commonwealth countries because of the shortage of legislative drafting capacity;
- * refine and identify policy issues for the determination of administrators and politicians; and
- * provide an action program that can be implemented without delay, when the necessary decisions are made.

were all demonstrated by the Harare experience. It is believed that similar initiatives could be taken, with participation of appropriate expertise of different Commonwealth countries, in all (or at least some) of the areas of the medico/legal/ethical character mentioned above.

CONCLUSION

10. The chief dynamic of the closing decades of the 20th Century is science and technology. The developments provide many perplexing problems for mankind and its lawmakers, including in energy sciences (nuclear fusion) and information sciences (computers linked by telecommunications). But amongst the most vexing are the problems of bioethics produced by advances in medical science and technology. Already 'test tube babies' have been born in at least four Commonwealth countries (United Kingdom,

India, Australia and Canada). Such births and other like developments may be expected in other Commonwealth countries with the passage of time. Similar legal and ethical problems will be presented. At present consideration of these issues - which are of universal dimension - is being left to hard pressed small and local committees, possibly working without the resources and perspectives that could come from international and multi-disciplinary consideration of the same issues. In many cases the problems are simply not being addressed because they are too complicated, too difficult or because other priorities have been fixed. In some cases problems are being left until they acutely pose their dilemma for lawmakers, as will be the case before too long, for example, with human cloning.

11. It is in these circumstances that the Commonwealth Secretariat could play an important leadership role. At the moment this leadership role in international problems of a legal dimension has passed by default to the Council of Europe or the OECD - organisations lacking the participation of many common law countries and virtually all developing countries. By commissioning appropriate studies, organising appropriate meetings of experts, preparing model legislation and cultivating a discussion within the worldwide community of the Commonwealth of Nations, the common problems (or some of them) could be tackled. They could be addressed in a way appropriate to the universal nature of the human body and/or the ethical issues raised and the international perspective that is possible only within the legal systems of the Commonwealth of Nations. The workshop in Harare tackled one species of a wider genus. It is to be hoped that it is the beginning of a major project which would admittedly be ambitious; but which is undoubtedly necessary and urgent.

FOOTNOTES

1. Shridath Ramphal, 'Lawyers and the Search for a New Global Equity', in One World to Share, selected speeches of the Commonwealth Secretary-General, London, 1979, 381, 387.
2. M.D. Kirby, 'Breastmilk Substitutes, Bioethics and Law Reform', paper for the Joint Commonwealth Secretariat/WHO/UNICEF Workshop on Implementation of the International Code on Marketing of Breastmilk Substitutes, Harare, Zimbabwe, 17 January 1983, mimeo. See also M.D. Kirby, Report on the Harare Conference, 'Breastmilk Substitutes Law Reform', January 1983, mimeo.
3. In vitro fertilization is the subject of an enquiry by the Australian National Health and Medical Research Foundation and also by special committees established by the Governments of the Australian States of New South Wales, Victoria and Queensland.
4. Cf. Beynon, Doctors as Murderers [1982] Criminal Law Review 16.
5. S. Ramphal, ibid, 380.