THE COMMONWEALTH FOUNDATION

REPORT ON THE JOINT COMMONWEALTH SECRETARIAT/WHO/UNICEF WORKSHOP, HARARE, ZIMBABWE, 17-21 JANUARY 1983

BREASTMILK SUBSTITUTES LAW REFORM

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

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HARARE WORKSHOP

1. In December 1982, on the intervention of the Legal Division of the Commonwealth Secretariat, I was awarded a Commonwealth Foundation Fellowship to attend a workshop on the Implementation of the International Code on the Marketing of Breastmilk Substitutes. The Workshop was jointly organised by the Commonwealth Secretariat, the World Health Organisation and UNICEF. It was held at the University of Zimbabwe, Harare, Zimbabwe between 17-21 January 1983. A condition of the award of the Fellowship was that a report should be provided concerning my participation in the Conference and indicating the value of the Conference to Commonwealth co-operation. It was a further condition that publicity of my attendance should include an acknowledgement of the Foundation's help. This report is in compliance with the first condition. The second condition has also been complied with.

2. I arrived in Harare on 16 January 1983. In advance of the Conference I had prepared a paper 'Breastmilk Substitutes, Bioethics and Law Reform', copies of which I took to the Conference and which were distributed to participants. The paper analysed:

* the possibilities of co-operation in law reform within the Commonwealth of Nations;
* the possibilities of co-operation on specific legislative proposals, such as the excessive use of breastmilk substitutes;

* the methodology used in Australia, including by the Australian Law Reform Commission, in securing public, expert and lobby participation in reform of the law, needed to tackle medico-legal problems;
* an analysis of the disadvantages of the promotion and sale of breastmilk substitutes, particularly in developing countries of the Commonwealth of Nations;
* an examination of moves for legal and other reform within the Commonwealth and elsewhere to limit the promotion and sale of breastmilk substitutes;
* a tentative evaluation of the proper response to the breastmilk substitutes problem, viz whether by voluntary codes, administrative action or specific legislation.

3. Attached to this report is a copy of my paper. Copies were earlier supplied to the Commonwealth Foundation and the Commonwealth Secretariat.

THE BREASTMILK SUBSTITUTES ISSUE

4. The workshop had before it essentially two issues, each of them of concern to co-operation between the nations of the Commonwealth. These were:

* the implementation of the WHO Code on marketing of breastmilk substitutes - a social, medical and human problem for large numbers of people in Commonwealth countries, especially in developing countries;
* the appropriate co-operative method of tackling the particular issue and issues of a like kind, given the general similarity of the legal systems inherited by Commonwealth countries and therefore the commonality of styles of legislation, general methods of administration and approaches to legal and administrative questions. It was in respect of this second concern that my participation was principally invited.

5. Put shortly, the breastmilk substitute problem arises from the widespread sale and distribution of breastmilk substitutes in countries where neonates and young babies would generally be better served by breast feeding and human milk. The reasons why 'breast is best' are summaried in my paper. They include:

* the composition of human milk is superior for human neonates to cow milk products;
* dilution and incorrect mixtures due to misunderstood instruction or inability to afford adequate formula are common and highly damaging;
* contamination by the inability to sterilize and the lack of provision of fresh clean water promote infection, the risk of which is radically reduced by breast feeding;

* breast feeding operates to delay the restoration of ovulation and hence is an effective and inexpensive and much needed contraceptive, particularly in developing countries where other forms of contraception are either expensive, unavailable or not socially acceptable;
* psychological bonding is achieved between mother and child, beneficial to the health of each by body contact and breast feeding; and
* large sums of scarce foreign exchange must be found to meet the cost to most developing countries of formula which must be imported.

The realisation of the problems mentioned above has led to development of a WHO Code on the marketing of breastmilk substitutes. The Code is in the form of a recommendation to Member countries of WHO. Implemention is left to Member countries. The meeting in Harare was addressed to the best method of attacking the issue of implementation.

6. The Conference comprised an opening program, numerous plenary sessions, workshop groups with reports to plenary, an opportunity to view films and television programs and to inspect literature on the subject, field work, discussion with journalists about community education and a closing session. Because of prior commitments in Australia, I was obliged to leave after the fourth day of the five day workshop. However, the lines of action on the two issues before the workshop were well established before my departure. I hope I made a useful contribution to each topic.

OPENING SESSION

7. The opening program was commenced with introductory remarks by Ms. Dorienne Wilson-Smillie, Adviser on Women and Development to the Commonwealth Secretary-General. She made the point that the principal purpose of the workshop was to stimulate national action on the WHO Code as was envisaged by the WHO. Exchange of experiences and views between Commonwealth countries could help in this process of stimulation. She discussed the limits of legislation and made the point that the issues before the workshop were to be seen in the context of numerous other problems facing women within the Commonwealth of Nations.

8. The opening speech was delivered by the Minister of Health in the Government of Zimbabwe, Cde. the Hon. Dr. Munyaradzi. He said that recent studies had shown that about a quarter of the world's children below the age of five were malnourished. He said that malnutrition in the child affected its mental and physical development and could therefore significantly reduce the individual's production potential and therefore affect overall national development. A number of studies in the developing world had indicated a

serious decline in breast feeding. According to the Minister a close correlation had been shown between this decline and high prevalence of malnutrition in young children. The cost of treating malnutrition and related diseases was high. In many developing countries of the Commonwealth, the beds in paediatric wards of hospitals were filled with children suffering from malnutrition-related disorders. The improvement of the nutritional status of countries would reduce mortality. Breast feeding alone, in the normal cases, could provide the new born infant with adequate nutrition during the first four to six months of life. The Minister referred to the various disadvantages of bottle feeding with breastmilk substitutes referred to above.

9. On behalf of the Executive Secretary of the Breast Feeding Taskforce of UNICEF, Dr. Y.G . Lee expressed thanks to the Minister. His contribution was followed by an outline of the scope, purposes and aims of the workshop offered by Professor Sir Kenneth Stuart, Medical Adviser to the Commonwealth Secretary-General. Sir Kenneth thereafter chaired the entire Conference. He did so with efficiency, patience and forbearing, securing from all participants their respect, co-operation and effective contributions. In his remarks, Sir Kenneth referred to the need to place the breastmilk substitutes issue in a wider framework. He referred to the discussion in my paper of the wider context of bioethics. He suggested that participants should see co-operation in the issue of breastmilk substitutes as a species of the potentially wider genus of co-operation between Member countries of the Commonwealth in medico/social/legal issues. He urged consideration of the model legislation, two drafts for which were before the workshop. He referred also to the initiative taken in Papua New Guinea, by the passage of the Baby Food Supplies (Control) Act 1977.

10. The opening session was then addressed by Dr. Manuel Carballo of the Mother and Child Health Division of the WHO Headquarters. Dr. Carballo reviewed succinctly the issues in the breastmilk substitutes debate. He outlined the initiatives of the WHO and explained the point reached in the WHO Code. Later in the Conference he showed a number of very significant slides which demonstrated especially the correlation between increasing use of breastmilk substitutes in developing countries and increasing and earlier conception, with attendant problems of larger population, greater needs for expensive artificial contraception and higher infant mortality. Dr. Carballo made numerous interventions at all stages of the workshop. He was an invaluable commentator on the work of the participants as the workshop progressed. Like Sir Kenneth Stuart, he earned the respect and admiration of all participants.

11. In short, there was a good working team, the total number of participants was manageable (about 40) there was a good spirit and a clear understanding of the seriousness of the issue tackled and of its many dimensions, including economic and political dimensions.. Counting participants from the Secretariat itself, there were representatives present from a large number of Commonwealth countries including Australia, *Bangladesh, Barbados, Canada, *Kenya, Gibraltar, *Lesotho, *Malawi, *Malayasia, *Sri Lanka, *Tanzania, *Trinidad, the United Kingdom, *Zambia and *Zimbabwe. An asterick indicates the status of participant. Extremely useful resource materials were provided by Mr. Billy Menary (CFTC Legislative Consultant Draftsman), Ms. Y. Bannister, Q.C. (Legal Consultant), Mrs. Margaret Owen and Ms. B. Swartz.

NATIONAL INITIATIVES

12. Participants had before them full reports on national initiatives pursuant to the International Code provided in respect of Bangladesh, Kenya, Lesotho, Malawi, Malayasia and Zimbabwe. Details of these were refined and corrected. Oral reports on the position in Australia were given by me and on the position in Kenya, Tanzania and Sri Lanka, were given by their representatives. The first two days were principally taken up in an analysis of the developments in the above countries and of the experience in each concerning:

* legislative and administrative initiatives; and
* compliance by the industry with the WHO Code.

13. Generally speaking, there appeared to be unanimity that improvement had occurred in the conduct of companies concerning marketing practices which were specially pernicious (leaving of samples at hospitals and direct advertising to the public). Nevertheless, in many countries, particularly in Africa, there was a feeling that more action was needed. However, it was generally recognised that that action needed to be tempered by recognition of the fact that some supply of breastmilk substitute was necessary, that involvement of local employment was often significant and that the withdrawal of the relevant companies would involve hardship, having regard to their manufacture and distribution of other, perfectly legitimate, products. There was a clear and general recognition of the inter-dependence of the medical, social, economic and legal aspects of the problems.

TACKLING MEDICO-LEGAL ISSUES

14. On the afternoon of the second day of the workshop, a session was devoted to the discussion of how a wide range of medico-legal issues could be tackled, by co-operative action within the Commonwealth of Nations. This

session, chaired by Sir Kenneth Stuart, was led by me. Reference is made to the discussion of the issue in the attached paper prepared before the workshop.

15. I described the methodology used by the Australian Law Reform Commission in preparing its report on Human Tissue Transplants (ALRC 7, 1977). The methodology involved the use of:

* expert, interdisciplinary consultants from different parts of the country;
* public distribution of short discussion papers and shorter pamphlet summaries setting out the problems and proposed solutions;
* public hearings to receive citizen, expert and lobby submissions in all parts of the country;
* use of the media, including press articles, television appearances, radio broadcasts and talk-back programs to bring the issues before a wide audience and to solicit submissions and reactions;
* use of public opinion polls and other surveys of public opinion;
* preparation of draft legislation to refine ideas and to secure further comments; and
* final delivery of a reasoned report presenting fully argued (but not unduly long) examination of sensitive social issues, with the presentation of options for Government and recommendations for action.

The success of this approach has been notable with the introduction of legislation based on the full report in four jurisdictions of Australia, and legislation introduced or proposed in three other jurisdictions.

16. Whilst acknowledging the differences of institutions, the sensitivity of politicians and the available manpower in different parts of the Commonwealth, the value of expert, lobby and public participation in the development of medico-legal reform proposals was stressed as a means of ensuring that sensitive questions are not simply put to one said as 'too difficult' for the lawmaking process. The value of public participation as a means of mobilising informed opinion and ensuring legal response was also emphasised.

17. There were many useful questions from a large number of participants scrutinising the Australian approach and considering and commenting on its applicability in different parts of the Commonwealth. I believe that this was an extremely useful session and one in which there was a good exchange of experience which may have an institutional value beyond that of its application, or possible application, to the breastmilk substitutes issue.

WORKING GROUPS AND APPROACHES

18. On the second and third day the workshop broke up into working groups which subsequently reported on the following topics:

* implementation of the Code in entirity or in sectors;
* using existing legislation to enforce the Code;
* different enforcement mechanisms for achieving the purposes of the Code;
* priorities in implementation of the Code;
* various mechanisms for implementation, having regard to home institutions and needs;
* exploration of statutory means of implementing the Code;
* exploration of other measures to implement the Code, e.g. by education and the provision of information;
* examination of expansion of the scope of the Code;
* scrutiny of the relevance of the breastmilk substitutes issue for the status of women and the protection of mothers within the Commonwealth;
* examination of the best methods of tackling the industry involved in the production of breastmilk substitutes.

19. Field trips were conducted in the paediatric wards of a major hospital in Harare and in villages and amongst women's projects in the countryside neighbouring Harare.

20. During the report back to the plenary session on strategies for action, I offered the plenary a schematic analysis of the various possibilities of action by Member countries. This schema, or modifications of it, will be included in the official record of the workshop. In essence, it divided various proposals as follows:

* Legislative action
  ** total implementation of the WHO Code (this has been done by legislative instrument in Peru);
  ** legislation to incorporate the WHO Code or parts of it in domestic law and to provide for enforcement by criminal sanctions (the Menary draft before the workshop);
  ** legislation to implement the WHO Code by translating its principal provisions relevant to domestic enforcement into draft legislation for adoption in Commonwealth countries (the Bannister draft);
  ** legislation addressing particular issues (such as requiring bottles and teats to be available only on prescription as in the PNG legislation);
  ** use of the existing legislation, e.g. legislation on pure foods (Tanzania); misleading advertising (most Commonwealth countries) or customs legislation (e.g. Sri Lanka).

* Administrative action

Various possibilities for administrative implementation of aspects of the Code were reported by working groups. These included administrative action to limit imports, to police dangerous products and generally, implementing consumer protection legislation already in force. Similarly the use of Government executive powers to control conduct of staff in hospitals, the design of public hospitals, the provision of services in publicly funded hospitals and otherwise to use the power of the purse, the influence of government on the media were listed.

* Voluntary guidelines

Under this head were considered the moves towards voluntary agreements with industry (reported in Kenya, Malaysia and other countries). Consideration of the effectiveness of such guidelines varied between those who believed this to be the most effective approach because of the key position of the industry and those who were sceptical because of the industry's self-interest in the promotion of its products and proved evasion of the faithful implementation of all provisions of the WHO Code. This was a major source of controversy amongst participants.

DRAFT LEGISLATION

21. The workshop had before it two drafts for legislation designed at model Bills in each case for an Infant Foods (Marketing) Act. The object of providing the drafts was to:

* focus the debate on particular proposals;
* draw attention to particular problems of implementation of the WHO Code in the legislative style common in the Commonwealth of Nations;
* provide a refined Bill for adoption, in whole or part, by those countries which wanted to go beyond voluntary guidelines or administrative action.

22. I chaired the committee of draftsmen from a number of Commonwealth countries who discussed the two draft Bills. A report on the work of that committee was prepared by Mr. Roger Rose (Kenya). It will be included in the final report of the workshop. It was not possible to marry the two drafts and provide one draft only. Each was a legitimate and professional approach to translating the general provisions of the WHO Code into domestic legislation. The committee considering the draft limited its

function, having regard to the time available to it, to providing detailed comments on each draft. Some of these comments related to policy. Others were matters of style and presentation which may be helpful to the draftsmen.

CONCLUSIONS

23. The workshop was a valuable Commonwealth exercise. It provided a useful forum for the exchange of experience both on the particular issue of breastmilk substitutes and the general issue of medico-legal law reform. Participants will take back to their countries a great deal of information and expertise on each of these topics. Furthermore, they will have available in due course the report from the Commonwealth Secretariat. They will also have available refined drafts of model legislation which could be considered for implementation, in whole or part, should home Governments consider it appropriate to introduct legislation. In every such case it would be necessary to reconsider the model Bill to ensure that it could fit comfortably into the legislative background and traditions of the receiving country. The days of exactly common legislation in all countries of the Commonwealth of Nations have probably gone forever. But the Commonwealth Secretariat has taken a most useful initiative in providing the draft legislation. It is not binding on Member countries, but does provide them, many with scarce drafting resources, with a good starting point should legislation be decided.

24. A major controversy at the workshop was the need for legislation. Some countries (especially Kenya and Malaysia) were generally content with the implementation of voluntary agreements reached between the Government and the breastmilk substitute industry. Furthermore, they were sceptical about the value of legislation and its likely effectiveness, believing that voluntary guidelines were more likely to achieve the social effect sought, without undue cost, administrative burdens and negative effects on legitimate industry. On the other hand, other delegates (notably from the Caribbean and Africa) were of the view that at least some legislative response would be needed to tackle persistent problems. In some cases administrative changes (e.g. directed at public hospital routines of bottle feeding) would be adequate.

FOLLOW UP

25. The issue of breastmilk substitutes has not been a major controversy in Australia. Reports of my address have brought the issue before a wide national audience in the Australian electronic and print media. Attached are reports circulated widely in the national newspaper, The Australian (20 January 1983, p.3) and in Canberra (Canberra Times, 20 January 1983, p.3) and Melbourne (The Age, 20 January 1983, p.9). Furthermore

a number of broadcasts have been made on the subject since my return to Australia. The Australian Broadcasting Commission has arranged an interstate radio hook-up to bring the issue to a large radio audience on 1 February 1983 for half an hour. There will be other follow ups in Australia. The role of the Commonwealth Secretariat and the Commonwealth Foundation are being brought to notice, as it the value of co-operation between Member countries of the Commonwealth of Nations.

26. Another aspect of follow up is a paper I have prepared on the subject of Commonwealth co-operation in medico-legal law reform. This is prepared at the request of Sir Kenneth Stuart and a copy is attached. It may be hoped that there will be future co-operation between lawyers, medical experts, administrators and legislative draftsmen of the Commonwealth of Nations in matters of mutual concern. The human body is common. The legal tradition and many of the laws are common. Administrative arrangements and approaches are generally common. The language of communication is common. There are notable opportunities for co-operation on difficult and proliferating medico-legal issue within the Commonwealth of Nations. These opportunities should be taken for the advancement of the good government of the people of the Commonwealth of Nations and their health and welfare.

ATTACHMENTS

1. 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, January 1983, mimeo, 4:83.

2. Extracts from the Australian print media reporting the Zimbabwe workshop.

3. M.D. Kirby, 'The Commonwealth Secretariat, Bioethics and Leadership', Note to the Medical Adviser, Professor Sir Kenneth Stuart, January 1983, mimeo.

RESERVATION

* Any views expressed are personal views only.