

383

AUSTRALIAN BROADCASTING COMMISSION

THE SCIENCE SHOW

MARCH 1983

BIOETHICS, BREASTMILK AND COMMONWEALTH CO-OPERATION

#### INTRODUCTION BY MR. ROBYN WILLIAMS

In January 1983, the Chairman of the Australian Law Reform Commission, Mr. Justice Kirby, attended an international seminar on breastmilk substitutes held in Harare, Zimbabwe. Listeners to this program will remember the contribution on the breastmilk substitutes issue last year by Professor R.V. Short of Monash University.

You might be forgiven for wondering what a judge - even a law reforming judge such as Mr. Justice Kirby was doing at a conference on this topic. Well, the conference was organised jointly by the Commonwealth Secretariat, the World Health Organisation and UNICEF to examine the implementation of the WHO International Code on Marketing of Breast-milk Substitutes. The Commonwealth Secretariat in London arranged for Mr. Justice Kirby to attend the Zimbabwe meeting because of the experience of the Australian Law Reform Commission in preparing Australian legislation on human tissue transplants. The law proposed by the Commission - on a sensitive subject of medico-legal concern, has been adopted in five Australian jurisdictions and is under consideration in the rest. As Mr. Justice Kirby points out, in the first of what we hope will be a number of occasional talks, the experts who gathered in Harare found that they had more in common than the problem of controlling the marketing of breastmilk substitutes.

AUSTRALIAN BROADCASTING COMMISSION

THE SCIENCE SHOW

MARCH 1983

BIOETHICS, BREASTMILK AND COMMONWEALTH CO-OPERATION

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

THE BREAST MILK SUBSTITUTES ISSUE

In the twilight of Empire, a lot has changed in Africa. But the common law of England has taken root and flourishes in much of the continent. Court houses bear the unmistakable imprint of long forgotten colonial architects. In republican Zimbabwe, judges are still 'My Lord'. Horsehair wigs, like afternoon tea, remain as vivid memories of British rule.

At the end of the rainy season, a group of lawyers from five continents, all of them brought up in the common law tradition, gathered in Zimbabwe to examine a bioethical problem common to many countries of the Commonwealth of Nations. They joined an interesting collection of social workers, nutritionists, health administrators and legislative draftsmen. The focus of concern? How, if at all, the law could be mobilised to confront the acknowledged problem of excessive marketing of breastmilk substitutes particularly in developing countries of the Commonwealth of Nations. First, the need for action was established by exchanges between experts from fifteen Commonwealth countries. The familiar arguments were canvassed:

- \* The composition of human milk can never quite be matched by cow milk products.
- \* Dilution and incorrect mixtures due to misunderstood instructions or inability to afford adequate formula are common and highly damaging to babies.
- \* Contamination of the product, because of the inability to sterilize the bottle or the lack of clean running water, raise the risk of debilitating and fatal infections in babies, many of them already malnourished.

- \* Psychological bonding achieved by breast feeding, generally beneficial to both mother and child, is lost with bottle feeding.
- \* Large sums of scarce foreign exchange must be found by developing countries to meet the cost of imported formula.

But the most powerful arguments for government action were suggested by statistical and graphical material presented by the representative of the World Health Organisation. There is no room for doubt. Large scale use of breastmilk substitutes tends to cause an early return to ovulation. It therefore hastens further conception. And this occurs precisely in those countries where artificial means of contraception are either not available, too expensive or not socially acceptable. Yet it is they who already suffer the blight of overpopulation.

#### WHAT CAN THE LAW DO?

What can the law do about all this? There is a need for some breastmilk substitutes. So total prohibition of the import or sale of such products would be too heavy handed. In any case, in such a personal matter, the law would be a blunt instrument with which to refashion attitudes. How can the law operate to correct the widespread impression that breastmilk substitutes are just another feature of advanced 'civilised' Western medicine?

Well, Papua New Guinea acted in 1977. When efforts to get voluntary restraint in marketing practices failed, the legislature passed a law banning the sale of feeding bottles, teats and dummies without a doctor's prescription. Preliminary studies suggest that this law has been effective in reducing reported cases of infant deaths attributable to malnourishment resulting from inadequate or unhygienic bottle feeding.

In 1981, the World Health Organisation agreed on a Code to limit the marketing of breastmilk substitutes. The code specifically forbids direct advertising to the public and the friendly distribution of 'samples' presented to mothers on their discharge from hospitals. Australia has consistently supported these WHO moves. But until now, at home, it has relied on voluntary self-regulation by the industry. Unfortunately, repeated reports of breaches of the Code in developing countries show that something more may be necessary. And this was the focus of attention at the Harare meeting.

The participants had before them two draft Bills designed to implement, at a national level, the rigorous requirements of the WHO Code. Because we all speak (roughly) the same language, share the same complex style of legislative drafting and enjoy - if that is the word - much the same bureaucratic traditions, it did not take long for us to get down to basics. Some countries made it plain that they intended persisting for the time being with voluntary guidelines. In other countries, where something stronger was needed, the draft Bills presented a practical form of international legal aid. Those strange people who draft legislation - odd mixtures of mathematicians and lawyers - are rare birds in Australia, let alone Africa and Asia. So the provision of a draft Act of Parliament with detailed clauses, in our familiar British style, was legal 'manna from Heaven' or in this case, to be more precise 'from London': for it was drafted in the Commonwealth Secretariat.

#### A COMMON LAW FOR TO-DAY

As I observed the sincere and anxious concern of these Commonwealth colleagues, tackling a common problem, I reflected on the large number of similar issues of law reform which may await a similar treatment. In fact, that was why I was invited to attend: to tell the participants of the way in which we, in Australia, tackled through the Law Reform Commission, the design of up-to-date laws on human tissue transplantation. I also told them of the way we were now beginning, by expert and community consultation, the task of tackling the legal complications that arise from in vitro conception (test tube babies). The advance of medical science is presenting our countries with many social, ethical and legal problems. Just around the corner and soon to demand attention, are the issues of human cloning, the use of foetal tissue for transplantation, the so-called right to die, surrogate parenthood and genetic engineering of the human species, to name but a few. These problems are coming upon us with ever increasing speed and complexity. They are not just problems for Australian law and society. They are problems for humanity.

All of the countries of the Commonwealth of Nations will, sooner or later have to face these issues. There will be differing social conditions and varying religious and cultural attitudes. But in this world, as it seems to me, we should seek to build on things we share in common. Where universal problems are presented common and co-operative solutions should not be dismissed as too difficult to achieve. The common language and the basically similar legal systems of the Commonwealth of Nations present us in the English speaking world at least with a rare opportunity to exchange information, pool scarce resources, exchange experiences and, sometimes, work together on a common law for to-day. That was the spirit in which the lawyers, scientists and health workers met together in the University at Harare. There was no grand communique to close the

session. There was not even a single agreed legislative text on breast milk substitutes regulation. Attitudes and local laws were too complex for this. But there was universal agreement that the law has a role in helping to solve and unravel some of the problems of bioethics. And that development of laws together could sometimes be useful where the problems are common. But there was also a lingering doubt. Can lawyers and law makers hope to keep pace with the range and complexity of the social and ethical problems presented to our generation by science? With so much attention focussed on elections - perhaps this is a question we should be asking ourselves in Australia.