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YOUNG MEN'S CHRISTIAN ASSOCIATION OF PERTH

PERTH YMCA METROPOLITAN AND SUBURBAN YOUTH CLUBS

SECOND ANNUAL YMCA OF PERTH YOUTH LECTURE

WEDNESDAY 3 AUGUST 1983

PARMELIA HILTON HOTEL, PERTH

JUVENILE JUSTICE - YOUTH AND THE LAW

July 1983

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The Hon Mr Justice M D Kirby CMG *
Chairman of the Australian Law Reform Commission

BREAKFAST WISDOM

Breakfast is not the best time for most of us. It was once said that an Englishman's idea of Paradise was an empty railway carriage in the morning. I have even heard it suggested that the Times of London was invented so that Imperial administrators, from Bunbury to Bangalore, would not have to speak to each other at breakfast. Apart from a grunt, they could absorb themselves entirely : the agony column of the Times being less uncongenial than the agony of actual human conversation.

I am assured that breakfast speeches are definitely 'in' in Perth. I am sure this says something about the internal fortitude of the people of Perth; but I am not sure what. It was with trepidation that I read the invitation to come over for breakfast. I remembered that Oscar Wilde once said that 'only dull people are brilliant at breakfast'.[1] I hope I will not confirm this prediction too well.

I was induced to accept the invitation by the strong support I feel for the continuing work of the YMCA. I am delighted to read that this year the YMCA of Perth is celebrating its 75th annivery. In fact, YMCA activities began here more than 100 years ago. However, in October 1908 the continuous service that is still going on commenced in earnest. What a world of change has come about in the position of young people in the world and in Australia since the foundation of the Association.

I was also encouraged to accept the invitation to speak by the knowledge that my predecessor in this lecture series was our Prime Minister, Mr Hawke — himself a distinguished son of this city. He then spoke in August 1982 of the great issue of youth employment in the future. Seven months to the day after his YMCA lecture he was elected Prime Minister. He now has the opportunity to translate his ideas into action. A similar fate does not await me or my observations for you this morning. But the work of the Law Reform Commission is dedicated to the improvement of the Federal laws of our country. And we must not be content with fine ideas and brilliant reports. It is vital that reform, modernisation and simplification of the law should be converted into actuality.

If I appear specially fragile this morning, it is because, in the last week or so, I have incurred the wrath of the New Zealand Prime Minister, Mr Muldoon (for a speech I gave in Auckland) and, quite possibly, of ASIO (for a speech I gave on the Crimes Commission in Canberra). With so many enemies, I need a few friends. Perhaps I will find them here, today. Mr Muldoon called my comments about the reconsideration of an Australasian Federation 'comic'. They did not so appear to Sir Paul Hasluck when he spoke in New Zealand 15 years before. Speaking from the position of a West Australian, he could explain to the New Zealanders both the problems and the advantages of Federation from the point of view of the West Australian community, further in distance from Sydney and Canberra than Auckland is. It is inevitable that people like me, who raise topics of controversy for community consideration, will sometimes attract the ire of practising politicians. Democracy has many advantages. But one disadvantage is that it puts a premium on safety in utterance. It sometimes discourages bold ideas and long-term thinking. It often deflects our leaders from facing hard problems of controversy and sensitivity. That is where law reformers like me come in. We do not have the luxury of postponing the 'too hard basket'. In a free society, we have the advantage of stimulating the interplay between cautious democratic institutions and bodies such as the Law Reform Commission, that encourage those institutions to face the world as it is and to bring the law into line. All too often in Australia, the law reflects the values and attitudes of the world in which the YMCA was created rather than the world in which it operates today. The business of law reform is one of dragging the law, speaking to each generation in the language of the past, into the modern world. Moral values and social attitudes are changing so rapidly. Unless the law can respond, it will neither earn nor deserve the respect of today's generation — especially amongst the young.

In my talk to you, I want to tackle a number of issues. Necessarily, I must do so briefly:

* first, I want to outline a little detail about the Australian Law Reform Commission itself;

Secondly, I want to mention some of the projects we have been engaged in relevant to the law as it affects young people;

Thirdly, I want to call to notice the tremendous variety in the provision of the law in Australia concerning young people;

Finally, I want to say something specifically about a controversial and difficult subject. It is a subject that came to attention as a result of a decision of the High Court in England last week. It concerns the right of young people to receive medical advice on contraception.

THE LAW REFORM COMMISSION AND THE YOUNG

First, let me say something about the Law Reform Commission itself. Because of the Federal Constitution, there are State and Federal law reform commissions in Australia. The Law Reform Commission of Western Australia is set up in Perth. It reports to the State Attorney-General, Mr Berinson, concerning improvements of Western Australian State laws. Many of its reports have led to reforms of Western Australian law. I am Chairman of the Federal Commission. It is established in Sydney. It works closely and co-operatively with the State commissions, including the commission in this State. Some of the finest lawyers in the country have been appointed members of the Federal Commission. One of our present Commissioners is a most experienced Perth lawyer, Mr James Mazza. Other Commissioners have included Sir Zelman Cowen, Sir Gerard Brennan (a High Court Justice), Mr John Cain (Premier of Victoria) and Senator Gareth Evans (the new Federal Attorney-General).

The Australian Commission works only on projects that are assigned to it specifically by the Federal Attorney-General. Whether under Labor or non-Labor Governments, it has been the fate of the Australian Law Reform Commission to receive assignments to inquire into highly controversial and contentious issues. These may upset some people. But it is surely desirable that in a community such as ours, we should be re-examining basic questions about our laws and the administration of justice. In the age of test tube babies, man on the moon, the microchip and nuclear explosions, the law and its personnel cannot be immune from fundamental re-examination.

Several of the tasks given to the Law Reform Commission have involved us in examination of the laws affecting young people:

* Criminal Investigation. In one of our first projects, we had to examine the laws governing criminal investigation by Federal Police. The report on this subject was in fact written by the Federal Attorney-General, Senator Gareth Evans, when he was a Commissioner. It is a major overhaul of the law on this subject. A key recommendation was the proposal for the use of sound recording of confessions to

police. Another recommendation was the special protections for young people being interrogated by Federal Police in relation to an offence. Specifically, it was proposed that there should be no questioning of a child under 16 years except in the presence of a parent, relative, friend, lawyer or other responsible person. Furthermore, it was recommended that when a child under 16 was held under police restraint, his parent or guardian should be immediately notified. Many police forces in Australia follow rules similar to this. But the Criminal Investigation Bill will put these rules beyond dispute, to ensure the fairness and integrity of interrogation of people who, by reason of youth, may be at a disadvantage in dealing with authority.[2]

* Human Tissue Transplants. A second relevant report is the one dealing with the law governing human tissue transplants. The report has become the basis of the law in all parts of Australia except Tasmania. It tackles many controversial issues. One of them, upon which the Commissioners themselves divided, was particularly contentious. Should a young person, under the age of majority, be entitled to donate a paired but non-regenerative organ (such as a kidney) to a brother or sister? Or should the law protect young people from bravado and, even where it might mean the death of a sibling, forbid child donations?[3] This is a matter upon which informed people of goodwill can differ. The important point is that the Commission's report assisted Governments and Parliaments to face up to these hard questions.

* Privacy. A further project upon which our report has just been sent to the printer relates to privacy protection. The report tackles many topic issues, including telephone tapping, the growing powers of officials to enter property, the computerisation of personal data and so on. In this project the Commission is co-operating closely with the Law Reform Commission of Western Australia. It is expected that soon after our report is made public, a report proposing reforms of Western Australian laws will also be delivered. In relation to personal information, one question relevant to young people arose, full of controversy. It seems likely that Australian privacy laws will follow the key provision of privacy protection laws overseas. They will propose the enactment of a statutory right generally to have access to data about oneself. But in such a case, what should be the rights of a young 'data subject'? What is to happen to a claim by a parent for rights of access to information about his child? I shall come back to this issue in the context of contraceptive advice.

Child Welfare: A further project upon which the Law Reform Commission has reported relevant to juvenile justice is the recent report on child welfare laws for the Australian Capital Territory.[4] That report is now under consideration by the new Federal Government. It recommends new police procedures for dealing with child offenders; a new specialised court for cases involving children and young people; the establishment of a Youth Advocate; the abolition of proceedings involving charging a child with being neglected and the substitution of care proceedings; new regulations on child employment; strict laws on child abuse and detailed proposals for regulation of child care services. The report is a major document. It contains 146 recommendations. The proposals for reform, though ventured in the context of the Australian Capital Territory, are relevant to State colleagues in all parts of Australia. One problem which is common throughout the continent is the tension between those who would take a social welfare approach to juvenile justice and those who would take a 'due process' criminal justice approach. In favour of the former approach is the feeling that young offenders are often the victims of their environment and need help rather than punishment. But opponents of this approach have pointed out that we have not yet refined our capacity to offer help in a totally effective manner. So-called 'help' can sometimes become oppressive both to the child and to the family. Help can sometimes involve lengthy interference in the child's life that would never be condoned for an adult criminal offender. The Law Reform Commission's report sought to strike the right balance between proper punishment, due process of law and adequate assistance for those young people who will respond. The report was commissioned by the then Attorney-General, Senator Peter Durack, whose distinguished contribution to law reform in Australia was recently celebrated in the Australian Law Journal.[5]

WHO ARE WE TALKING ABOUT?

One of the real problems of talking, even at breakfast, about youth and the law is that there is no certainty as to whom we are talking about. What is 'youth'? People may have their own private views, depending upon their own rate of maturity and that of members of their family. But the law likes to have firm and arbitrary rules. We derive our general legal system from England. Yet it was not until quite recently that children began to attract special treatment in the English legal system. The child welfare laws of this century extended enormously the legal regulation of the conduct of parents, guardians and children. On the other hand, the 'age of consent' was coined from judicial practice which developed from an Act of Parliament passed in the reign of Philip and Mary.[6] This Act was passed by the English Parliament 'to prevent the taking away or marrying of maidens

under the age of 16 against the consent of their parents'. The provisions of that far-away statute, and the age of 16 which it fixed, remain, in one form or another, in the law of all the Australian State criminal statutes governing young people and the law in modern Australia.[7]

Other laws and statutes have developed until today, the law governing young people is enormous. And it is something of a mess. The position varies in different parts of Australia. But a typical list, based on the law of the ACT, shows the different approaches to the legal prescription of youth for the purposes of legal consequences:

6 The age at which a child must be enrolled at school.

8 The age of criminal responsibility.

10 The age at which, subject to parental consent, a child may effect an insurance policy on his own life.

12 The age at which consent to adoption must be secured.

14 The age at which a child is presumed to understand the wrongs of a criminal act.
The age at which a boy is presumed to be capable of sexual intercourse.
The age at which a child must be heard in custody or access proceedings in the Family Court.
The age at which a girl may be given judicial authority to marry.

15 The school leaving age.

16 The age at which, generally, a girl may give consent to sexual intercourse
The age at which a boy may be given judicial authority to marry.
The age at which a child becomes eligible for unemployment benefits.

17 The age at which a driving licence may be obtained.

18 The age of majority and voting.
The age at which a person may make a valid will.
The age at which it is no longer possible for the Family Court to make a custody or access order.

19 The age at which a young person is liable for registration under the National Service Act.

21 The age at which a young person is entitled to be registered as a tax agent or Minister of Religion.
The age at which a young person is qualified to be a Member of the House of Representatives under the Australian Constitution.
The age at which the Minister for Immigration ceases to be the guardian of immigrant children.[8]

of course, it may be rational to have a younger age for consent for sexual relations than for the age of voting. But for many people, given the differing ages at which young citizens mature and the general tendency for them to mature earlier than in times gone by, the differing ages fixed by statute seem to have little connection with modern reality.

YOUTH AND CONTRACEPTION : A RECENT CASE

I now want to turn to a specific subject relevant to youth and the law, which was brought to notice last week by a decision of the High Court of Justice in England last week. The case involved an action brought by Mrs Victoria Gillick, herself a mother of 10 children, seeking a court declaration that a circular issued by the English Department of Health and Social Security, advising doctors that they can give contraceptive advice and treatment to girls under the age of 16 without their parents' knowledge or consent, was unlawful. Mrs. Gillick, a woman aged 36 and a devout Roman Catholic living in Cambridgeshire, sought a declaration from Mr Justice Woolf that none of her five daughters, aged between one and 13, must be given advice or treatment without her specific parental consent. Her counsel, Mr Gerard Wright QC, told Mr Justice Woolf[8] that a doctor who knowingly gave contraceptive advice or treatment to a girl under the age of 16, could be 'very close' to committing a criminal offence of aiding and abetting unlawful sexual intercourse (carnal knowledge). This was a reference to the fact that the legal age for consent for sexual intercourse is still 16, the age fixed by legal history just before the reign of the first Queen Elizabeth and for the protection of 'deflowering' maidens, who, following sexual intercourse, probably lost their hope of marriage and dowry.

Mrs Gillick's Queen's Counsel told the court that she found the circular 'quite intolerable'. According to her, it encouraged the secret provision of the Pill or other contraceptives to under-aged girls. She wanted to retain her right and duty as mother to the exclusion of any other person, to advise her children on sexual matters. Specifically she wanted to retain her right to prevent other persons doing things that would encourage her children to have a sexual relationship 'which the law forbids'.[9] The legal action was brought only after Mrs Gillick had written several times to the health authority asking for an assurance that none of her daughters would be given contraceptives without her consent. This request was refused. The departmental policy was that contraceptive advice for children under the age of 16 years was in the sole discretion of the doctor. According to Counsel:

> This is for girls for whom it is illegal to have sexual intercourse. That may be done not merely without the consent of the parents, but in deliberate secrecy.[10]

Mrs Gillick asserted her 'fundamental right' to concern herself with the moral upbringing of her children and a 'fundamental right' to rebuke and even prevent interference. Though professional secrecy between the doctor and his patient was important, confidentiality should not be permitted to 'cloak illegalities'. To do so would be to completely abandon the protection of the law against under-aged sex.

Mr Simon Brown, Counsel for the Department, rejected Mrs Gillick's argument. He drew upon a competing area of the law. He said that so long as young people knew the consequences of their decision, they could give valid consent for medical treatment. An under-aged girl who had sexual intercourse was not herself guilty of a criminal offence, though the man might be. Therefore, in giving the girl advice and medical treatment, the doctor could not be said to be encouraging or procuring a criminal offence. Remember that Mrs Gillick sought the orders in relation to her five daughters — not her five sons. Contraceptives were said to be prescribed to those under the age of 16 for their own good and to stop the tragedy of unwanted pregnancies. There was no reason to suppose that doctors and family planning clinics want to encourage their patients to have unlawful sex. But it was their duty to give confidential advice to their patients, including young patients, of sufficient maturity to understand the advice. Better that the advice be given by professional doctors than that it be gleaned behind the school shed or at the local disco.

Mr Gordon Gillick, aged 43, told the London Times that he was 'totally in agreement' with his wife's stance on the issue. The case was brought, financed by legal aid, and watched, according to the Times, with intense interest by civil servants and pressure groups. The National Director of the Society for the Protection of the Unborn Child described the position adopted by the Health Department as 'absolutely appalling'. She forecast a parliamentary campaign to tighten the law if the Gillicks lost their case. Mr Gillick declared:

> My children are not going to kick over the traces. But if they do later on, that is their choice. But it is the intervention in the family by the Department of Health and its agencies ... that we feel is so wrong. They actually go round and sell promiscuity in the schools.[11]

You see in this case why the law is such a fascinating but demanding vocation. Here was a judge, in the midst of a busy case list, faced suddenly with a case of the highest controversy. On both sides were sincere people standing for their perceptions of important principles. The law of the land would ultimately govern the case. But in the end, what value was to be assigned a higher priority:

- the right of a young person, like any patient, to have confidential advice from a doctor, or
- the right of parents to govern the lives of their children according to the moral code in which they want to bring them up;
- the right of doctors to face reality and help young people who are likely to have sex any way, to avoid the special tragedy of unwanted pregnancies, abortions and venereal diseases with the burden they places on families, individuals and society as a whole; or
- the right of parents, opposed to contraception, to prevent having information on such an intimate matter forced upon their children in a compulsory school context.

Last week, a short report appeared in the Australian press indicating that Mr Justice Woolf had dismissed Mrs Gillick's case. According to the report, children under the age of 16 are entitled, in England, to receive contraceptive advice without the knowledge or consent of their parents, at least where the alternatives sought to be prevented were unwanted pregnancies, abortions and venereal diseases. Mr Justice Woolf reportedly viewed the prescription of the contraceptive pill as not so much 'an instrument for a crime or anything essential to its commission' but a palliative against the consequences of the crime [of unlawful sexual relations].[12] Mrs Gillick was not impressed. She said that the state had 'taken away the right of parents to protect their children'. It was not indicated whether an appeal would be brought or legislative action sought to reverse Mr Justice Woolf's determination.

I must admit that as I followed this case, I felt just a little brotherly judicial sympathy for Mr Justice Woolf. In a sense, I felt as if I had been through it all before. When the Law Reform Commission put out its discussion paper on the subject of privacy protection, it proposed that the privacy of young people should be protected. That much was not particularly controversial. But the machinery of protection suggested by the Law Reform Commssion proved highly controversial. We proposed, tentatively, that a three-pronged approach should be taken:

* at the age of 12 there should be absolute right of access by parents to confidential information about their children, whether medical, educational or otherwise;
* from the age of 16, we proposed that there should be no such right without the consent of the child and that therefore the only person to exercise the right of access after the age of 16 should be the child himself or herself; and
* between the age of 12 and 16, we suggested that it should be left to the record-keeper (whether doctor, teacher or otherwise) to decide whether or not to permit access by a parent to a child's secrets.

Never has a proposal by the Australian Law Reform Commission generated such an avalanche of responses. Thousands of letters were sent. Petitions were signed in churches. Many were the suggestions that claimed that the Law Reform Commission was destroying family life. The proposal we put forward has been modified in the report, which is now with the printer. My purpose is not to discuss this issue at any length. Nor can I discuss at length the particular circumances of Mrs Gillick's case in England. The full judgment of Mr Justice Woolf has not yet reached us in Australia. But the controversy that surrounded the claim of parental rights to children's private secrets, both in Britain and Australia, illustrate the sensitivity of this issue. It is an issue that will not go away, as the Gillick case and the Law Reform Commission papers demonstrate. Fundamental values are at the heart of the debate:

* the respect for the integrity and privacy of the individual, even the young individual;
* the respect for the unity and coherency of the family as a fundamental unit of modern society;
* the law's general protection for medical confidentiality to ensure that treatment is based on uninhibited information;
* the law's protection of young people against seduction or premature unconsensual sexual experience;
* society's legitimate right to prevent unwanted pregnancies, abortions and venereal disease;
* the parents' right to look to the law to uphold their entitlement (whatever others do) to bring young people up according to a particular moral code, at least so long as the children remain young and vulnerable.

THE LAW'S APPROACH

England. The recent decision in England was not written on a blank page. It was formulated against the background of decisions of the court and opinions of the British Medical Association dealing with advice and treatment for young people about contraception. Changing attitudes to sexual morality in Britain, as in Australia, have greatly increased the number of young people having early encounters with sex. Also in Britain, as in Australia, the number of unwanted teenage pregnancies has continued to rise. The law's prohibition against sexual relations with young people, its prohibition or discouragement of advertising of contraceptives, its requirement of a doctor's prescription for some forms of contraception and its facility for doctors advising parents of medical treatment given to their children, none of these have managed to discourage the rapid and apparently continuing growth of early sexual experience. The common law of England did not adopt an arbitrary age for consent for medical treatment, determined by reference to a birthday and the chronological passage of time. On the contrary, it took a remarkably sensible

approach, which is perhaps to be expected from a system of law developed to solve problems rather than develop to state grand theories. The common law permitted the young person to consent to medical treatment so long as that young person had the ability to understand fully the issues involved. As to whether there was that appropriate level of understanding, it was a question of fact in each case. Obviously, the more serious the procedure, the more unlikely that a young child, particularly below puberty, would have the necessary understanding. If the child could not provide a full and knowing consent to the particular procedure involved, the consent of the parent, guardian [or of the state] was necessary. Relying on this principle, courts in England have agreed that a schoolgirl aged 15 should be allowed to have an abortion against the wishes of her parents, the judge saying:

> I am satisfied she wants this abortion; she understands the implications of it.[13]

An instance of the state stepping in, with general public support, to override the perceptions of parents and their moral views, can be seen in legislation permitting a parental refusal of blood transfusion to be overruled. Where it is a small, minority religion, the community applauds the firm action of the state, protecting the perceived interests of the young person. But where the opposition is larger and more vocal and where the matter touches the sensitive and controversial questions of sexuality, our community is much more ambivalent about the respective rights of the state, parents and the child.

Leaving aside the more difficult issues of abortion and the fitting of contraceptive devices to female minors (for these involve surgical operations) is the supply of contraceptive drugs or contraceptive advice to young patients in a different class? Here there is no question of physical assault. But there are questions of the respective rights of parents and children, of the integrity of the family and the proper limits of state intervention. Assuming that, as has just been held in England, no criminal or ethical offence occurs where a doctor gives advice to a young person about contraception, should the doctor have a right or duty to inform the parents of what he has done? Generally speaking, parents should have a right to know what is happening to the children in their care. Ideally, they should consent to any medical treatment, irrespective of the child's capacity to understand the complexities. But if the child refuses and insists upon respect for his or her confidentiality, may the doctor breach that patient's privacy because the patient is young? A recent English text suggested this approach:

> Parental concern is with the sexual intercourse and if their lack of control is such that intercourse is occurring, it implies either that they are indifferent or that they regard the practice as inevitable or that the situation is beyond their

> control. Thus they forfeit any absolute right to know of the steps which are being taken to limit the ill effects of their daughter's lifestyle. Certainly, the doctor has a duty to explain to his young patient the undesirability and dangers of indiscriminate sexual intercourse, certainly he must point out that his patient's partner is committing an offence but, beyond that, he is arguably acting in the best interests of all if he respects confidentiality when it is demanded.[14]

In England, there is official backing for this policy in the Health Department Memorandum so recently challenged in the courts.[15] It also has professional support in the BMA Handbook of Medical Ethics.[16] Nevertheless, there is a degree of professional ambivalence. This arises out of a desire of adult doctors to respect parental responsibilities. In 1971 a doctor informed the parents of a girl, aged 16, that she was using contraceptive medication. The doctor had been informed, as family physician, by a birth control centre. A complaint was lodged against the doctor. It was held that the doctor was not guilty of serious professional misconduct because he took what he believed to be the best course in protecting his patient. Nonetheless, the British Medical Journal expressed the view that as a general rule the physician should observe even the young patient's confidentiality.[17] It has been suggested that in today's British society a different result would have ensued in that case. Certainly the decision by Mr Justice Woolf will encourage departmental policymakers in the belief that the community's interest in family planning to combat unwanted pregnancies, abortions and venereal disease amongst teenagers condones private contraceptive advice to the young, even against the knowledge and wishes of their parents, so long as the young are of sufficient maturity to understand the nature of the medical advice they are receiving.

Canada. In Canada, the debate has been vigorous and except in Quebec (where there is a statutory obligation to inform parents) it also proceeds against the background of the English common law. In 1970 a physician in British Columbia was found guilty of infamous or unprofessional conduct for supplying a birth control device to a 15-year-old female patient without parental consent. His misconduct was held to lie in intentionally not disclosing his treatment to the parents. The Supreme Court of Canada upheld the ruling, though it did not say that the physician was always obliged to inform parents. It simply held that in that particular case he was, because the mother had already been in touch with the doctor.[18]

The whole issue of contraceptive advice to young people was reviewed in 1975 by the Institute of Law Research and Reform of Alberta, one of the Provinces of Canada. In that country, as in Australia and Britain, the figures disclosed a large increase in sexual activity amongst young people. Furthermore, large numbers of ex-nuptial children were

being born to unmarried girls under the age of 20. In fact, 23% of the illegitimate children born in Alberta were born to minors.[19] The Institute concluded that the withholding of contraceptive advice to young people was not a deterrent to their sexual activities. Accordingly, it was better to face reality and to facilitate the avoidance of unwanted pregnancies. But then the Institute faced the issue of whether parents should be informed of contraceptive advice, assistance and prescription. Would doing so unacceptably invade the medical privacy of the young person? Would it deter them from seeking help and thereby vitiate the whole objective? Would failure to provide information to the parents fracture the unity of the family and the parental right to counsel, warn and uphold their perceptions of morality? This Canadian institute concluded:

> "We are aware that Quebec's statute imposes on a physician an obligation (in most cases) to inform the parents and that British Columbia's 1973 amendment confers on parents a privilege of informing the parents. We accept the general proposition that it is better for minors to take their parents into their confidence. Our understanding is that the practice of physicians is to try to persuade young patients to do this. If the patient agrees there is no problem. The hard issue arises where the minor is adamant in refusing. We think that in these circumstances the usual obligation of confidentiality should apply. This [is our] formal recommendation. ... [20]

United States. If the cases coming to the courts have been rare in Britain, Canada and Australia, there has been no shortage of litigation in the United States. In 1965 the Supreme Court held that a State prohibition against the use of contraceptives violated the constitutional privacy rights of married couples.[21] Six years later this protection was extended to the use of contraceptives by unmarried adults.[22] In 1973 the Supreme Court handed down its critical decision overruling a State anti-abortion statute on the ground that it intefered with the privacy rights of pregnant women.[23] All of these cases involved adults. Then in 1976 the right of privacy of the minor was raised in the Supreme Court. The court held that a State law could not constitutionally impose a blanket requirement of parental consent on a minor having an abortion during the first trimester of her pregnancy.[24] This decision explicity recognised the medical privacy rights of young people. A year later, in Carey v Population Services International[25] the Supreme Court of the United States, whilst acknowledging that the position of young people and adults was not the same from the point of view of privacy, overruled a New York statute which prohibited any person from selling or distributing any contraceptive aid to a young person and banning all contraceptive advertisements. New York State had

defended the legislation as necessary to deter juvenile sexual activity. However, there was virtually universal support amongst scientists and social scientists for the view that limiting access to contraceptives did little to deter teenage premarital sexual activities.[26]

Needless to say, as is usually the case, these Supreme Court decisions invited a great deal of public comment and scholarly analysis. Public comment has been as divided as these issues are divisive. In fact, the latest decision upholding the right of young people to normally secure contraceptive advice without State interference, provoked the introduction of Federal legislation into the Congress seeking to limit that right. The legislation known colloqually as 'the Chastity Bill' or the 'Squeal Law' would seek to impose on Federal appropriations of grants to medical services, a requirement, in the area of premarital adolescent sexual relations and pregnancy, tha hospitals, doctors and others should notify parents and obtain parental consent before rendering any federally supported services to minors.[27] So far, the law has not been passed. It is interesting to observe how, in the United States, these great controversies tend to be fought out not in the democratic legislature but in the unelected Supreme Court and according to the suggested import of the Bill of Rights drawn up in the aftermath of the American Revolution in 1790.

The Squeal Law was one politician's response to the Supreme Court decision about the right of minors to have contraceptive advice and assistance without parental consent. For the other point of view, a recent edition of a United States law review proposed:

> [C]onfidential access to contraceptives serves the important State interest of promoting the health of minors, and encouraging responsible decision-making and responsible sexual activity. It also acts to decrease the incidence of teenage pregnancy — a State goal of great importance — which should be one of the dominant motives behind any legislation in this area. Parents remain free to influence their children in any manner they see fit, according to the usual method in which parent/child conflicts are resolved within the individual family. It is recognised that teenage pregnancy is a serious problem. Increasing the fear of pregnancy by burdening the minor's right to confidential access to contraceptives will not deter sexual activity, and thus will not solve the problem of teenage pregnancy. A better alternative would be to encourage parental consultation without requiring it, and to improve the quality of the minor's decision through sexual education programs. This would serve the State interest of encouraging an informed, mature decision, encouraging parental involvement, and protecting the minor's health, without the counterproductive threat of coerced parental notification.[28]

CONCLUSIONS

Now, we in Australia have not yet had a major national debate, let alone major legal decisions relevant to this aspect of the law and young people. True it is, in New South Wales a 1970 statute permits a young person aged 14 years or older, validly to consent to medical or dental treatment. The statute says that such a consent '... has effect in relation to a claim by him for assault or battery in respect of anything done in the course of that treatment as if, at the time when the consent is given, he were aged 21 years or upwards'. The statute makes the position in New South Wales a little clearer than in other States and Territories where, except for the case of the Northern Territory, there is no clear statutory guidance as to what is a 'mature' or 'emancipated' minor who can seek and receive confidential medical advice and treatment.[29]

Doctors throughout the country must always be guided by the principle of informed consent by their patients. If the child is mature enough to give it, and certainly if the child is 'emancipated' (something evidenced by living away from parents or having joined the armed forces etc) the doctor may satisfy himself that, though young, the patient is mature enough to give consent and to make decisions on his or her own behalf. Generally speaking, in Australia, medical practitioners observe an ethical rule that children over 14 years, if sufficiently mature, are entitled to privacy of medical consultation and advice even as against their parents. But the position in Australia is complicated by our system of medical benefits under which claims for the cost of medical treatment by the family doctor must normally be made against the parent's health insurance fund. In these circumstances, the competing claims of medical privacy to the young patient and of contractual obligation to the fund and to the parent subscriber come into sharp conflict.

There is no simple solution to the problem I have raised with you this morning. The Law Reform Commission of Western Australia has been asked to seek a solution that could become the basis for uniform laws of the States and Territories throughout Australia. Any such uniform solution must take into account the realities of teenage sexuality in Australian society. Persisting in the unreal world that laws against advertising contraceptives or against providing contraceptive advice will somehow diminish sexual activity, is plainly self-deception. A recent survey on sexual experience amongst young people in Australia involved 6,500 respondents, most of them girls under 20. Of the total, 55.5% said they were no longer virgins. The survey showed the high proportions of young girls in Australia having regular sex who were not using any form of contraception:

11-14 year olds	28.5%
15 year olds	24.2%
16 year olds	13.8%

Even amongst those who were using contraception, 22% of those aged 14 and under reported that they were relying on the withdrawal method, not notoriously successful from the point of view of preventing the spread of venereal disease or avoiding pregnancies and later abortion.[30]

More than half of the respondents said that they could not discuss sex with their parents. Twenty three percent of them did not have any sex education at school and could not discuss sex with their parents. Forty percent said that sex was no part of the school curriculum. The most common sources of information were friends, books and magazines. As to the age of the loss of virginity, the figures demonstrate, if representative, a radical change in Australia's society today when measured against the rules laid down in the reign of Philip and Mary:

* 8.8% had lost virginity at 13 years;
* 18.8% at 14 years;
* 24.5% at 15 years.

There are some in our society who will read these figures with great pain. They will denounce the declining standards, call for stricter laws to punish carnal knowledge offences, propose a ban on the provision of contraceptions and contraceptive advice which they see as encouraging licentiousness in the immature. There are others who, facing reality of modern Australia and the unlikelihood that the law will be able to change that reality, will:

* encourage sex education in schools especially for those many Australian children who cannot talk to their parents about the subject;
* provide contraceptive advice of a general character and instruction in the prevention of pregnancy and venereal disease; and
* facilitate confidential medical advice to those young people, mature enough to understand, on contraception, without exposing the doctor to ethical problems or the child to unwanted disclosure to the parents of such a personal aspect of life, against his or her wishes.

Above all, as a society, we should be tackling the issue of non-communication on this important aspect of life. Out of the failure to communicate, out of modesty that has become shame, out of embarrassment and fear, we have created taboos. Some of these are reinforced by laws inherited from earlier times. It will certainly be a good thing if a thorough and public discussion of these questions can result in guidance to our lawmakers

on laws suitable for modern Australia. It is surely better that such laws should be designed in the community and in Parliaments than in courtrooms by judges who may not be in tune with the values and attitudes of society today, and who are not accountable if they get it wrong.

Seventy five years ago when the YMCA began its vital activities in Perth, this talk of mine would have been a public scandal. The open discussion of such issues, particularly by a judge, would have been regarded as outrageous, even morally reprehensible. The fact that we can now talk about these things — even at breakfast — indicates the way our society is changing. Things may be less genteel today. But they may also be more honest, more open and less hypocritical. I can offer you no definitive answers to the issues I have raised with you. But I hope you will agree that they are worthy of your attention. And for the answers, we should make sure to listen to the voices of the young men and women of Australia.

FOOTNOTES

* The views expressed are personal views only.

1. O Wilde, An Ideal Husband, 1895, 1.

2. The Law Reform Commission (Aust), Criminal Investigation (ALRC 2) interim, 1975, 126.

3. The Law Reform Commission, Human Tissue Transplants (ALRC 7) 1977, 47.

4. The Law Reform Commission, Child Welfare (ALRC 18), 1980.

5. Contribution to Law Reform of Senator Durack QC as Attorney-General 1977-1983 in (1983) 57 Australian Law Journal 320.

6. 4 P & M c8. See also 9 Geo IV, c31 (1828).

7. H Gamble, The Law Relating to Parents and Children, 1981, 157.

8. These and other details of relevant ages under Australian law are set out in ALRC 18, 34.

9. The Times (London), 19 July 1983, 3.

10. ibid.

11. The Times (London), 20 July 1983, 3.

12. Sydney Morning Herald, 28 July 1983, 6.

13. Butler-Sloss J in unreported decision, the Times (London), 14 May 1982, 24.

14. J K Mason & R A McColl Smith, Law and Medical Ethics, 1983, London, 103.

15. DHSS Family Planning Service Memorandum of Guidance, HN (81) 5, February 1981. Cf A Samuels, 'Contraceptive Advice and Assistance to a Child Under 16' (1982) 22 Med Sci Law 215.

16. BMA Handbook of Medical Ethics, 1981.

17. British Medical Journal, 20 March 1971, referring to General Medical Council v Brown, 1971, the Times (London), 6, 8 March. The decision was severely criticised in an editorial comment in (1971) 121 New LJ 214.

18. Re D & Council of the College of Physicians and Surgeons of British Columbia (1970) 11 DLR (3d) 570.

19. Alberta, Institute of Law Research and Reform, Report No 19, Consent of Minors to Health Care, 1975, 13.

20. ibid, 19.

21. Griswold v Connecticut, 381 US 495 (1965).

22. Eisenstadt v Baird, 405 US 438 (1972).

23. Roe v Wade, 410 US 113 (1973).

24. Planned Parenthood v Danforth, 428 US 52 (1976). For a discussion see J A Siliciano, 'The Minor's Right of Privacy : Limitations on State Action After Danforth and Carey', 77 Columbia L Rev 1216, 1224 (1977).

25. Carey v Population Services International, 431 US 678 (1977). Discussed Siliciano, 1231ff.

26. See eg Cutright, 'The Teenage Sexual Revolution and the Myth of an Abstinent Past', 4 Fam Plan Perspectives, 25 (1972). A number of references are cited by Siliciano, 1233, fn 91.

7. S 1090, 97th Cong., 1st Sess (1981).

8. Discussed A L Morano, 'The Right of Minors to Confidential Access to Contraceptives', 47 Albany L Rev 214, 239-240 (1982). See also similar conclusions by J L Rue, 'The Distribution of Contraceptives to Unemancipated Minors : Does a Parent Have a Constitutional Right to be Notified?', 69 Kentucky LJ 436 (1980-81).

9. H A Finlay and J E Schombing, Family Planning and the Law, 149.

10. S Chester, 'Teenage Sex Leaves Many Disappointed', in the Age (Melbourne), 27 July 1983, 19. The article summaries a report 'What Sex Means to You' in Dolly magazine, August 1983. Note that the methodology of the survey is unspecified but appears to be one of self-selecting responses. Figures may not therefore be a fully scientific reflection of the entire population, even though the sample (6,500 people responding) is very large.