

493

AUSTRALIAN SOCIETY OF ORTHODONTISTS  
TENTH AUSTRALIAN ORTHODONTIC CONGRESS  
MELBOURNE, 5 MARCH 1984

ORTHODONTISTS, DENTISTRY AND LAW REFORM

WILKINSON ORATION 1984

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

WILKINSON ORATORS

An Oration is, by its nature, a solemn event. Most lawyers get through their lives without ever being taxed by the obligation to orate. Certainly, one could not describe the stumbling efforts of most counsel in the well of a court as an 'oration'. These fitful, often ill-assorted words, offered up to the altar of the judge or jury, lack the sustained elegance of a modern Demosthenes or Cicero. To prepare for this event, I have read a number of the past Wilkinson Orations. It is clear that the distinguished band of dental specialists who are my predecessors came closer to oratory, in its strict sense, than most lawyers do. In the ascending order of communication, my obligation is to go beyond the 'chat', to press further than a 'talk'; to rise above the 'speech' and to orate. It is not an art that comes easily to the modern lawyer. Lost in the world of microchips and interplanetary travel, the lawyer today is hostage to the world of science and technology that includes orthodontists.

The first obligation of an orator in a series such as this is to do honour to the memory of the person in whose name the series is established. As Professor Howl said in the Ninth Oration in 1982, the distinction of naming an Oration after a professional man is not without its disadvantages:

The first and most obvious of these is that one usually has to be dead, or nearly so, before one's colleagues recognise and, more importantly, actually agree that such a distinction is merited. Furthermore, in the nature of things, you can exercise no control whatsoever either over the choice of the orator or of the outrageous things that he may choose to say in the Oration bearing your name.<sup>1</sup>

I did not know Stanley Wilkinson and I suppose that most future orators will lack that advantage. But even the most casual glance at his record shows that he was a reformer — a professional reformer. So I feel an affinity for him. And I believe I know something of the obstacles and barriers that he would have faced as he endeavoured to introduce new ideas to his chosen profession.

Everyone here will know how, despite early disappointments and rejections, he ultimately pursued his interest in orthodontics by gaining admission to the famous school offered in California by Edward Angle.<sup>2</sup> The tale is told in Professor Sutherland's 1980 Oration. It is an inspiration to read it. Wilkinson came back to Australia, set up in specialist practice in Melbourne and was the founder and first President of your Society. He mastered the Byzantine world of professional politics. Thrice he was President of the Victorian Branch of the Australian Dental Association. From 1945 to 1950 he was Federal President of that Association. He did many new things. He took an active interest in the Royal Flying Doctor Service. He was the founder of the mobile dental service in the Kimberley region of Western Australia. He was said to be a stubborn man.<sup>3</sup> I agree with Professor Sutherland that a streak of stubbornness is an important feature in the personal characteristics of those who, against opposition, seek to reform our society. It is true whether the reforms are directed at professions (usually citadels of conservatism) or at society's institutions and laws.

#### THE CHALLENGE TO PROFESSIONS

In the latest Gazette of the University of Sydney there is reprinted an address given in 1983 under the title 'Will the Professions Survive?'<sup>4</sup> The author refers to a seminar offered by the Australian Council of Professions in which Dame Leonie Kramer cautioned that professions had become the servants of public policy, rather than advisers to public policy boasting of uncommitted neutrality.

There are many today, in the traditional professions, who question the perceived decline and fall in the status of and respect for the professional. This is also true in the legal and medical professions. I am sure it is true in dentistry and orthodontics. Why should this be so? Why does the professional man and woman of today not enjoy the same adulatory respect that Dr Wilkinson and his contemporaries had? We can all cast our minds back to the suburban doctor, the local solicitor and the white-coated dentist. They were the real heroes of suburban Australia when we grew up. Where has it all gone wrong, as society today questions and criticises the professions? Nowhere must the irony of the change of mood be more keenly felt than in the dental profession. When the professional of today was young, the dentist worked with equipment which by modern standards would be seen as quite primitive. The standards of dental health, to say nothing of cosmetic dentistry, were poor in Australia when measured against the standards of our time. There have been radical improvements in the past three decades. In these circumstances, the dental practitioner, partly released from the thrall of pulling and filling, is surely entitled to more and not less respect.

The reasons for changing perceptions of the professions, including yours, can be quickly stated. They include:

- . The general decline in respect for institutions which has accompanied higher standards of general education in the community. When institutions, including the professions, are more familiar, they are liable to be held less in awe and more likely to be placed under the microscope of the community's critical gaze.
- . There is the greatly increased access of citizens to professional people that has come with the beneficial developments of Medicare, legal aid and thoroughly worthwhile schemes for the improvement in the delivery of dental services.<sup>5</sup> This greater access, born also of increased general prosperity, has facilitated the awareness of the limitations and deficiencies of all human professionals.
- . There is also the increased number of groups claiming professional status. The Monopolies Commission in England reported a few years ago that 130 bodies claimed to be professional. The mystique of the identifiable few is diminished as more and more groups make their bid to join the club.
- . Consumerism is a potent force in the dealings between citizens and businesses in the commercial field. But it is difficult to hold back the tide of consumer protection and to exempt the professions from the rules against monopolisation and the procedures in favour of the swift and informal public resolution of complaints.

Most potent of all is the growth of government funding and the implications this has for the professions. I suspect that this was what Dame Leonie Kramer was hinting at. It is inevitable, as it seems to me, that as professions take the benefit of public expenditure, so must they succumb to greater public involvement and even control. The lawyers reap the benefit of legal aid. The doctors, and in part the dentists, take advantage of Medicare. But it is a fundamental principle of our system of government that public funds come attached with public strings. In their long constitutional history, the British people had frequently to assert this principle in battles with the King and the Executive Government. On one view, King Charles I lost his head over this principle. When Parliament votes the people's money, it is absolutely basic that it has the right to assert its interpretation of the people's will. This rudimentary principle does not seem yet to be fully appreciated by the professions in Australia. They seem anxious to take the money but to cling to old ways. Change is coming belatedly. It is uncomfortable but, as it seems to me, inevitable that the change will affect the perceived status and independence of the professions, increasingly dependent as they are upon Federal gold. We should look on the bright side. Though there may be a decline in perceptions of status and independence, there have already, undoubtedly, been significant improvements in the delivery of professional services to ordinary citizens. The true professional will regard that as a more than adequate consolation.

Finally, there are the disappointments. I refer not only to the front page stories of doctors involved in medi fraud, of lawyers embezzling client funds or dentists involved in unprofessional conduct. Even more damaging, as it seems to me, is the perception of professional selfishness. I, at least, have always taken the special mark of the professional person to be an ideal of service to the community, beyond selfish interests. This is what distinguishes, at least in my mind, the professional from the purely commercial activity of society. True it is, something more than a reasonable salary may be expected by professional people. Years of study, and possibly deprivation, must be compensated by society, as must high standards of concentrated work, skill, risks and responsibility. It is also true that there is a certain ambivalence in the community. It expects a professional tennis star to extract high fees; yet it is disappointed when professionals try to do the same. There is no doubt that the Australian community has a growing perception of professional people as selfish self seekers, earning high levels of income in times of economic recession, using the special dependence of the community upon their skill as an immoral bargaining weapon in the pursuit of greater wealth, yet free from much public accountability. I do not comment on the justification of that perception.

But it is undoubtedly there. When the ordinary working man and woman receive an income determined in large part by industrial tribunals and when the highest officers of the country have their income determined by a Remuneration Tribunal, the demand of professional people, themselves drawing heavily and increasingly on the public purse, for old-fashioned independence and the free market, strikes most Australians as a buccaneer attitude, strangely anachronistic in today's social circumstances.

#### DENTAL HYGIENISTS

I have said that the ideal of service to the community above self-interest is the traditional mark of the professional. It is the guiding star by which those who claim that proud title of 'professional' must be directed. I regret to say that in the dental profession it is a guiding star that lately seemed to lose its attraction. I hasten to say that this remark is not universally relevant. Some dentists have never lost sight of the star. In some parts of Australia it gleams brightly. Nor are my remarks specifically addressed to orthodontists, for I do not believe that they are particularly involved in the controversy I will now address. But it should be a concern to all members of the dental profession that a wrong principle may have entered the determination of a matter of community dental hygiene. For this can tarnish the good name of the dental profession and present it, and its governing bodies, as nothing more than the most selfish trade union, with no boast of professionalism, looking solely to the interests of its members. I refer to the controversy about dental hygienists, and the attitude of the organised dental profession of Australia, Federally and in most of the States, to such dental auxiliaries. Though the needs of orthodontists for auxiliaries in dental practice are somewhat different, it is worth taking your time to study the case of the hygienists. It is a modern test case, as it seems to me, for the integrity of a profession. And in the test, some have been found wanting.

I take as my text in developing and illustrating these assertions the comment of Professor Howe in the 1982 Wilkinson Oration:

I am utterly convinced that dentistry must remain a university-based profession but venture to suggest to you that many of our everyday tasks could be done by others whose training and services are less expensive.<sup>6</sup>

True it is, Professor Howe went on to assert that such para-dental personnel should only complete their tasks under delegation and should not 'attempt to do things which they are neither trained nor competent to do'.<sup>7</sup> In short, they should not enjoy an independent practice but should be members of a dental health care team, headed by a graduate dentist. For present purposes, and at this stage in the debate, I would go no further than Professor Howe.

Most of you will know something of the controversy concerning the employment of dental hygienists. I refer to those para-dental operators, not dental technicians in the strict sense nor professional graduate dentists, who perform the time-consuming, often tedious, but necessary work of scaling and cleaning teeth, advising on hygiene and diet and who perform other minor procedures associated with dental hygiene.

South Australia is the only Australian State which presently has a training school for dental hygienists as such. It produces approximately ten dental hygienists in each 18-month period. In the other States, and nationally, there has been, to put it mildly, a significant and powerful body of resistance on the part of the organised dental profession. The question I raise is whether that resistance is based upon a true evaluation of the public's interest in dental hygiene or upon an introspective and selfish perception of the self interest of dental professionals.

In order to answer that question, it is necessary to review certain events. In the early part of the last decade moves seemed well advanced to see the introduction of dental hygienists in dental practices in Australia. For example, representations were made by the Australian Dental Association (New South Wales Branch) to the State Minister of Health in about 1972 for the amendment of the Dentists Act 1934 to allow dentists to employ dental hygienists to assist with dental hygiene procedures encountered in dental practice. As a consequence of these approaches, the matter was examined by a working party of the Professional Services Advisory Council. This body, in turn, recommended amendments to the Act for the introduction of the auxiliary or dental hygienists as a permitted class of person who could, in association with a professional dentist, perform duties of the kind I have mentioned. In 1977 the Registrar of the Dental Board advised the Health Commission of New South Wales that the Board endorsed, in principle, the use of dental hygienists in dental practice.

However, in 1979 the Australian Dental Association (New South Wales Branch), in company with professional dental bodies elsewhere in Australia, suffered a change of heart. The New South Wales Branch advised the Minister of Health that it was not in favour of the training of a separate auxiliary to carry out scaling and cleaning of teeth.

As a consequence of this change of attitude, the Health Commission of New South Wales called a halt to the proposal for amendment of the State law. Nonetheless, perceiving a valuable role for dental hygienists in public dental services in New South Wales, particularly in Schedule V Hospitals, the Director of Dental Services suggested in 1981 that the Dentists Act should be amended to at least permit the utilisation of dental hygienists by government agencies. The interruption to the introduction of more general reforms, to authorise the engagement of dental hygienists, effectively delayed legislative change in New South Wales for nearly five years. Amendments to the Dental Act were not passed until late 1983 and then.

What are the explanations for this change of mood in New South Wales, reflected as it is by similar opposition expressed in other States where the law remains unreformed, notably Queensland and Victoria?

I wrote to the New South Wales Branch of the Dental Association, curious to understand the change of heart. The justifications offered were, in essence, threefold:

- . First, it was said, 'To put the matter simply the employment ... is illegal and contravenes the law'. Of course, to a lawyer and a law reformer such an explanation was unconvincing. It begged the question as to whether the law was in need of change.
- . Secondly, it was suggested that dental prophylaxis had to be performed by a registered dentist because the assessment of socket depths and the necessity or otherwise of periodontal treatment required trained professional judgment. If this were not so, it was said, the universities were wasting 'a lot of energy and under-graduate time over five years'. This explanation too seemed unsatisfactory. Dental hygienists exist lawfully in South Australia and, more recently, in the Australian Capital Territory. There are laws for their registration in each of the 50 States of the United States. For many years, they have been accepted in that great country, where the high cost of professional manpower imposes special obligations to find a more cost-effective delivery of professional services. As long ago as 1962 the American Dental Association Council urged the employment of a dental hygienist so that the professional dentist would have additional time 'to devote to more complex treatment'.<sup>8</sup> It seemed scarcely likely to me that the needs of dental practice or the minor racial variations of the human oral cavity, as between the United States and Australia, could justify the assertion that something so universally accepted in a country so similar had been adopted foolishly and wilfully by the American dental profession, in the face of their plain professional duty to their patients.



. And so I came to the third, and I believe the genuine reason for the professional resistance in Australia to dental hygienists. I refer, of course, to the dental manpower situation. Indeed, as if in justification of restricting the activities of dental hygienists in Australia, it was pointed out to me that 'South Australia has the worst dental manpower situation in any State in Australia and at the present time some 16 of last year's 40 graduating dentists are unemployed'. <sup>This is said by</sup> The advances in dental techniques and community dental hygiene, notably with the introduction of fluoride, have reduced the demand for some professional dental services. But the question remained whether the solution to that problem was to prevent the engagement of properly trained but less expensive auxiliaries to perform ancillary services, in order that professional dentists could fill in their growing spare time doing so, without uncomfortable competition from professional auxiliaries.

That this is what some members of the dental profession seriously assert is made still more plain by publications within the dental profession. For example, the August 1983 newsletter of the Victorian Branch of the Australian Dental Association outlines proposals to 'update' a policy statement previously adopted in 1970 and amended in 1975. That policy statement had urged the:

recognition of the dental hygienist and the extended duty of dental assistants as possible future auxiliary members of the dental health team for employment in both private practice and government service ... subject to appropriate training ...<sup>10</sup>

The modification of this proposal urged upon Victorian dentists in late 1983 was brutally frank:

The introduction and utilisation of these auxiliaries must be predicated on a survey of the dental work force that is currently available to meet the needs and demands of the population. There is at present a decrease in the demand for dental treatment in the private sector. Many recent graduates are unemployed or under-employed and many practices are under-utilised. Some auxiliaries are endeavouring to extend their clinical duties. In this climate it is inappropriate to introduce further clinical auxiliaries to the dental workforce. Recently the Federal Council in reviewing this subject recommended a moratorium on the additional of auxiliary categories to the dental workforce in States where they do not exist at present.<sup>11</sup>

This statement by the Victorian Branch contrasts sadly with the report of the 1969 Victorian Dental Advisory Committee. That report had concluded:

The committee agreed that dental therapists ... could be most valuable in preventive dentistry by undertaking some of the simpler clinical procedures and educational work for dentists in institutional and private practice, for example, removal of stains, plaque ... and instruction in oral hygiene and dietary habits, topical application of fluoride and similar prophylactic procedures, routine radiography and preliminary dental examination.<sup>12</sup>

The Federal body of the Australian Dental Association responded to this 1969 report that the Australian dental profession supported introduction of dental hygienists so long as they were working under the direction and control of a dentist.

No-one should think that this topic is an academic subject of purely theoretical discussion. In New South Wales, on 12 November 1982, a well regarded Sydney dentist, himself a past member of the NSW Branch Council of the Australian Dental Association and a participant in several dental committees, was prosecuted before the Dental Board of that State for employing a dental hygienist in his practice. He was held to be guilty of misconduct in a professional respect. He was dealt with by the Board and suspended from his practice for two months. The person who was engaged as the dental hygienist in question had formal qualifications obtained in the United Kingdom. In addition, she had substantial practical experience. Many dental hygienists were dismissed as a result of these proceedings.

Lately, there has been a great deal of attention given in our society to monopolistic and anti-competitive activities of the professions which cannot be justified by reference to the need to protect the public. Much of the attention in this debate has focused on the legal profession in respect of its claim, in some Australian States, to a monopoly in paid land title conveyancing. But other professions have also come under scrutiny, notably the medical profession and the engineers. Now, it is dentistry's turn.

There seems little doubt that the present provisions of the dental legislation still operating in most parts of Australia prevent the engagement by dentists of properly trained hygienists. Certainly that was so in New South Wales before the recent amendments. The case in New South Wales is warning enough that dentists in other States who offer this auxiliary service to their patients may run the risk of disciplinary proceedings and punishment, whatever the skill and training of the hygienists and whatever the supervision provided by the professional dentist.

The over-supply of professional dentists and their under-utilisation is, of course, a proper source of concern not only for dental professional associations but for the whole community. It represents a terrible waste of skilled manpower, to say nothing of personal disappointment and frustration. But the solution to this very modern and not atypical problem of manpower over-supply is surely not the utilisation of legislation which was designed to prevent incompetents from doing truly professional work. Dentists would be amongst the first to condemn featherbedding, including for reasons of technological change, when it appears amongst car assembly workers or modern train conductors. They must apply the same principles to their own profession. Indeed, they must do so with greater vigour because of the very fact that they assert a claim to professionalism. Theirs is not a vocation whose justification is solely the achievement of a high income. The boast of professionalism carries the obligation always to be guided, ultimately, by the community's interest, even to personal disadvantage. No doubt those in the organised dental profession of Australia who have resisted the entry of dental hygienists have acted honourably, usually in a sincere effort to protect new members of the profession, already disadvantaged by changes in community dental health. However understandable their action, I regard it as unacceptable when tested against the ultimate obligations of professionalism and when measured against the principles of law that govern non-professionals.<sup>14</sup>

I am sure that the public of Australia generally was not aware of the change of heart by the organised dental profession, of the prosecution of a colleague, of the dismissal of such hygienists as had been engaged and of the resistance to reforming legislation, once enthusiastically supported by the profession. If the public of Australia were aware of these developments, I believe they would be rather angry with the conduct of the organised dental profession, disappointed at the tale of such obvious self-interest and cynical about the claims of disinterested professionalism.

#### BLUNT TALKING

I talk bluntly because I am sure that Wilkinson would expect nothing less of me. He was a reformer and an innovator. He embraced the high skill of orthodontics. He went to the United States to bring its new techniques to this country. Doubtless when he was there, he saw efficient dental hygienists working under the supervision of professional dentists, for dental hygienists have been an important part of the practice of dentistry in the United States since 1913. They have existed in the United Kingdom, Canada and Japan for

over 30 years. They are legally employed, as I have said, in South Australia and the Australian Capital Territory. Throughout Australia, they may operate legally in the Armed Forces which are governed by Federal law. But elsewhere in Australia they are under a moratorium, whose principal justification appears to be a self-interested decision to protect present practitioners, not based exclusively on the public's interest.

So long as the professions, through their governing bodies, act in a self-interested way, motivated primarily by the desire to protect the club rather than to serve the community, they will engender community cynicism and contribute to the decline in the respect for the modern professional. The tale I have told tonight is not one specifically directed at orthodontists; but it is one relevant to their profession. Indeed, it is relevant to all professions. It is, if you like, a case study of modern professionalism, self-interest and public duty.

Were he here, I believe that Stanley Wilkinson would rejoice in the marvellous advances that have led to such a commendable improvement in Australia's general dental health. He would share our anxiety about the consequences of this improvement for the dental professionals of tomorrow and especially for the young dentists, full of the hope of service, now entering a profession with some over-supply of numbers. But I have little doubt that this innovator and reformer would join with me in suggesting that the solution to the manpower problems of the dental profession does not lie down the path of prosecuting colleagues, dismissing auxiliaries, enforcing restrictive legislation and imposing moratoria on legitimate change. Such conduct is unworthy of professionals. May it not demean the high calling of dentistry and diminish, by association, the standing of all professionals?

#### BY A STAR, SHINING BRIGHT

A recent economic analysis of the United States dental profession has concluded, despite the long-standing facility for para-professional auxiliaries in the dental profession, that the State legal restrictions on the use of 'para-dentals' have resulted in significant increases in average costs of dental services to the patient.<sup>15</sup> The greater the State restrictions, the greater are the costs to the patient. These increases are ascribed by the investigators to the inevitable costliness of enforcing the relative use of dentist time, as against the time of para-professionals in the same dental work. How much more applicable would this conclusion be to the Australian scene, where the restrictive laws, protecting the profession's monopolies, were typically written long ago and remain unchanged in language of the greatest generality.

The tale of reform of Australian legislation restricting the use of dental hygienists is one which requires us, in the end, to address the professional things that dentists, and dentists alone, should be permitted, by law, to do. Might it not be time for a national re-examination of this question, in duty to the young people now entering the dental profession apparently in excessive numbers, and in duty to the obligation of dentistry to supply to the Australian community the most cost-effective dental care to the greatest possible number?

Cost-effectiveness and community service will surely imply the increasing use of para-professionals, whether dental hygienists, other auxiliaries more suited to specialties such as orthodontics or, indeed, para professionals in other professions. Delineating the proper respective functions of the professional and of the non-professional and determining the circumstances in which the latter may perform those functions is an important issue before the dental profession in the decade ahead. The answer to these questions will not be found in the absolutist prohibitions of old legislation but in a reflective consideration by worthy professional people of the minimum essential boundaries of their vocation. The monopolies, guaranteed by law, should be drawn as narrowly as safety permits. The boundaries should be found by reference to the guiding star of public interest. I hope you will see that star clearly, shining bright and not obscured by pollutant self-interest and self-protection.

#### FOOTNOTES

- \* The views stated are personal views. The Australian Law Reform Commission has no current inquiry concerning orthodontists as such. Nor is it specifically looking at the issues of dental hygienists, whose qualifications to practise, outside Federal agencies and the Territories, is the responsibility of State Parliaments and State professional bodies.
- 1. GL Howe, 'Wither the Dental Specialties?', Ninth Stanley Wilkinson Oration, Hong Kong, 8 March 1982, mimeo.
- 2. KJG Sutherland, Eighth Stanley Wilkinson Oration, 1980, mimeo, 1.
- 3. *ibid*, 2. See also GN Davies, 'Professional Education and Social Change', Seventh Stanley Wilkinson Oration, 1977, published in Australian Orthodontic Journal, Vol 5, No 2, 45.

4. P Miller, 'Will the Professions Survive?' in Sydney University Gazette, February 1984, 20-21.
5. See eg alternative schemes for the delivery of dental services in Australian Dental Association (Victorian) Newsletter, July 1983, 7.
6. Howe, 6.
7. *ibid.*
8. Cited JM McIntyre, 'The Role of the Hygienist in Dental Practice', in Australian Dental Journal, Vol 27, No 2, 1982, 47.
9. Letter from the President of the Australian Dental Association (NSW Branch) to the author, 20 April 1983, 1.
10. 'Proposed Alterations to Branch Policy' in Australian Dental Association (Victorian) Newsletter, August 1983, 2. See also the Dental Board of Victoria, Report, 'The Auxiliary and Dental Practice', April 1976.
11. Australian Dental Association (Victorian) Newsletter, August 1983, 3.
12. Victoria, Dental Advisory Committee, report to the Victorian Minister for Health on Dental Services, 1969, paragraph 171.
13. See eg J Nieuwenhuysen and M Williams-Wynn, Professions in the Market Place, 1982.
14. The reference is to the provisions of the Trade Practices Act 1974.
15. AS De Vany, WL Gram, TR Saving and GW Smithson, 'The Impact of Input Regulation : The Case of the US Dental Industry', 25 Journal of Law and Economics 367, 381 (1982).