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GOVERNMENT OF VICTORIA

YOUTH POLICY DEVELOPMENT COUNCIL

SEMINAR ON YOUNG PEOPLE AND LEGAL JUSTICE

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YOUTH, SEX AND THE LAW

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YOUTH, SEX AND THE LAW
The Hon. Justice M.D. Kirby, CMG

CONTRACEPTIVE ADVICE TO TEENAGERS

By reference to a recent decision of the House of Lords in England in Gillick v West Norfolk and Wisbech Area Health Authority [1985] 3 WLR 830, I want to make a number of comments about youth, sexuality and the law. These are topics which must be approached delicately because of their sensitivity. But their importance to the legal system and the considerable changes which have occurred in sexual conduct of young people, make it appropriate and timely to review the law on this topic to consider whether it is still apt for our society today.

The Gillick case will probably influence legal developments in Australia because of the similarity of common and statute law. A majority of the English House of Lords refused a declaration sought by Mrs Victoria Gillick, a mother of 10, to forbid the local health authorities from giving contraceptive advice to her daughters under the age of 16, without her consent. The Law Lords stressed the desirability of securing parental consent. However, the decision permits doctors in England to give contraceptive advice if they are convinced that the child is likely to have sexual intercourse with or without contraceptive treatment and is likely to suffer unless given such advice.

Although it is possible for statute law to override a ruling of this kind, and acceptance of the ruling in Australia has not yet been established, the decision allows flexibility to doctors, stresses their paramount duty to their patient and recognises the rights of young people as separate from those of their parents.

The common law is a marvellously flexible instrument. It permits the development of principles which can be adapted by the judges to take into account the technological and social change. This was the point stressed by Lord Scarman in the Gillick case. The law ignores the revolution caused by the contraceptive pill and changing attitudes in society at its peril. The common law does not lay down arbitrary ages in relation to securing medical attention. It stresses the importance of referring to the maturity of the young person, the seriousness of the medical intervention and the alternatives open to the doctor. Obviously, as a young person approaches legal maturity, the range of matters upon which the law will require parental consent will diminish. It is significant that Mrs. Gillick made her application only on behalf of her daughters, not her sons. An excessive concern about parental rights may reflect the failure of parents to communicate with their children on sexual matters. It may reflect a sense of shame and ignorance of the wide spread changes in sexual practices which empirical research repeatedly demonstrate. Whether we like it or not, such changes have occurred. The House of Lords decision merely adapted the law to the change and the need for proper medical advice to young people caught up in the

change. It is a tragedy that more parents are not concerned about the rising incidence of cigarette smoking amongs young people, especially young girls. That will undoubtedly cause long term public health problems. Perhaps there will be a new priority of attention to parental responsibilities in respect of cigarette smoking and less attention to parental 'rights' in respect of sex education and contraceptive advice.

Doubts on the part of young people concerning the confidentiality of consultation with health workers is an established barrier to young people securing access to professional health services. New South Wales has legislation to permit a young person 14 years and over validly to consent to medical care. South Australia has passed (but not yet proclaimed) similar legislation. To supplement the Gillick decision, legislation along similar lines could be considered in other States. Because of the rise of youth unemployment, drug taking, youth homelessness and youth prostitution, there is a need for the law to facilitate access by young people with problems to medical and legal professional care. Otherwise the problems simply compound and the young person may become another statistic in the criminal justice system.

RISE IN YOUTH CRIME

Young people are over represented in the Australian criminal justice system. They account for the majority of property related offences, such as breaking and entering, burglary and motor vehicle theft. Young people are more likely to be convicted than adults but the crimes they commit tend to be less serious particularly in relation to the amount of property

involved and the level of injury to victims. Of 9694 prisoners in Australia identified in the 1984 Prisons Census, 3679 were under the age of 25 years (37.8%). This figure does not include the number of young people held in juvenile corrective institutions (978 offenders). Even this figure excludes young people charged with 'status offences', such as neglect or uncontrollability. Accordingly, the figure under-estimates the level of incarceration of young people.

Statistics prove the advantage of legal representation in criminal proceedings. However, it is important in the case of young people for legal representation to commence at the time of police interviews in order to prevent the risk of serious injustice. A proposal along these lines was made by the Australian Law Reform Commission in 1975 but was still not Federal law. (See Australian Law Reform Commission, Criminal Investigation, 1975 Interim). Duty lawyers at magistrates courts do their best in representing young people. However, often the level of representation is inadequate, representing the appearance of independent advice not always matched by the actuality. Legal aid services do not typically provide representation at police questioning and tend to be court based without a recognition of the special difficulties encountered by young people dealing with the police. There is a need for a Youth Advocate as proposed by the Australian Law Reform Commission in 1980. (See Australian Law Reform Commission, Child Welfare, ALRC 18, 1980.) Such an officer could assume responsibilities to speak up for young people in their encounters with the criminal justice system, including young

people in juvenile institutions and performing community based corrective work.

It is also important to be sensitive to so called "gender discrimination" involved in the prosecution of "status offences" under child welfare law (uncontrollability and neglect). In December, 1984 (the most recent statistics available) 22% of the 871 detainees in such centres throughout Australia were non-offenders ie 'status offenders'. Of even greater concern is the disproportionate incarceration of females for such offences. On the above figures, 83.2% of males were offenders or alleged offenders. But only 47.6% of females were such. 52.5% of female detainees were non-offenders who were in custody for status reasons ie alleged neglect or uncontrollability. Because of the high priority placed by the legal system on liberty of the subject, it is imperative to introduce the strictest scrutiny of "status offences" and to examine critically possible gender discrimination in the application of such laws. It is important to make sure that such laws, frequently administered and applied by men, do not represent an outdated male oriented attitude to the sexuality of young females. The decision of the House of Lords in the Gillick case gives a signal to courts throughout the common law world, from a normally conservative and cautious source. This signal is the need for the legal system to adapt to the changing reality of young peoples' sexuality, particularly young female sexuality. As Lord Scarman said this change was the inevitable consequence of the contraceptive pill. This is simply one more illustration of the impact of science and technology on society which it is imperative for the law, and society itself, to accommodate.

Putting our head in the sands and pretending that things remain the same as in the "good old days" - which were not so "good" after all - will not restore earlier attitudes. We must face the realities of our youth. And we should not be quite so sure that they have got it wrong and that the older generation got it right. Perhaps their attitudes to human relationships are more honest. In any case, things have changed and are changing. It is necessary for the law to change too.

OTHER LEGAL PROBLEMS

There are other issues in the legal needs of youth. They include:

- * the educational system: the introduction of rights and duties to reduce arbitrary decisions and to increase the accountability of education to students' needs.
- * employment: because of the disproportionate number of young people not members of unions and high youth unemployment, there is a disproportionate involvement of the young in part-time, casual, unskilled employment with risks of payment of below award wages, unsafe working conditions and sexual harassment.
- * accommodation: the rising cost of rent has increased the need for legal assistance to young people in conflict with landlords.
- * bureaucratic rights: young people have a high level of involvement with government agencies, including educational, social security and criminal justice

agencies. Yet they are not high users of the protective mechanisms now established, such as the Ombudsman, the Administrative Appeals Tribunal and other like bodies established to enhance accountability. It is important that they become aware of these facilities, so that their rights can be protected.

YOUTH POLICY DEVELOPMENT

I welcome the establishment of the Youth Policy Development Council in Victoria. This body will encourage attention to a range of legal issues concerning young people quite apart from the criminal justice system. The law affects people in every aspect of their lives. It is important that there be a central body for the development of a modern legal system more sensitive to the needs of young people. It is also essential that such a body should listen to the voice of young people themselves. Often that would require surveys and statistical research so that the needs and problems of young people can be brought home to government and Parliament for the development of a legal system which is more just because it is more modern.

Reference

This paper draws on a paper presented by Dr. Ian O'Connor, Department of Social Work, University of Queensland, to the Australian Institute of Criminology's Seminar Youth, Crime and Justice, unpublished, 9 December, 1985.