

Summary of Speech delivered 21 May 1987, Auckland
to Centennial Meeting of New Zealand Medical Association

SUMMARY OF SPEECH BY JUSTICE KIRBY

EMBARGO: THURSDAY, 21 MAY 1987, 10.00 A.M.

SUBJECT: AIDS WILL REQUIRE RADICAL LAW CHANGES, SAYS JUDGE
CAUTION NEEDED IN BIOETHICAL LAWS, SAYS KIRBY

AUCKLAND, THURSDAY

A leading Australian Judge predicted today that the spread of AIDS would lead to a number of radical changes in community attitudes and laws.

Justice Michael Kirby was addressing the Centennial meeting of the New Zealand Medical Association in Auckland. He was delivering the Inaugural Glaxco Medical Association Lecture to an international conference of doctors and scientists. Justice Kirby was the Foundation Chairman of the Australian Law Reform Commission for 9 years before taking up his present post as President of the NSW Court of Appeal.

Review the future of medicine from a medico-legal view point, Justice Kirby said that special attention would need to be given in the years ahead to four problems:

- * medical and legal responses to the spread of AIDS.
- * introduction of more effective controls to combat the spread of narcotic and other drugs.
- * introduction of greater candour concerning the moral and legal implications of medical decisions which are influenced by economic considerations; and
- * the need for caution against rushing in with legislation on experiments involving advances in biotechnology, such as in vitro fertilisation and surrogate parenthood.

HARD QUESTIONS POSED BY AIDS

Justice Kirby said that the spread of the AIDS virus, and the present absence of any cure for people with AIDS necessitated a number of hard choices being made in society:

"What of the provisions of condoms in prisons? Reports suggest that prison guards have refused to distribute them in some parts of Australia. Is a sense of delicacy and a stand on "principle" more important than the provision of a means to prevent the potential spread of the deadly virus to persons in a dependent situation. Recent reports in the New Zealand media record the objections of some parents and other social commentators to candid sex education of very young people at school, given in direct and plain terms. But given that a lethal virus is abroad, which we cannot yet cure, might such instruction not be the least we should do to warn young people of the ways in which they can avoid infection? If this means a certain loss of "decency", are we not summoned to that course by the higher morality of saving life and warning the ignorant and vulnerable?

This question is only one of many by which our society, through the AIDS virus, is confronted by a fundamental choice. The choice poses the question of the value we place upon human life and the control of the spread of the AIDS virus as against upholding present laws and maintaining a sense of decorum. No-where more starkly is this quandry posed for our two professions than in connection with the handling of intravenous drug users. Both in New Zealand and Australia schemes have been

devised for the exchange of used needles. Use of contaminated needles is estimated to be the means by which nearly 20% of AIDS sufferers acquired infection. In a sense, the schemes for syringe exchanges appear to condone practices in relation to drugs which the criminal law strongly forbids. Yet whilst police and courts pull strongly in the direction of the vigorous enforcement of drug laws, public health officials see the high proportion of AIDS victims who are infected with the virus through the sharing of dirty needles. In New South Wales earlier this month it was announced that legislation would be introduced to authorise a program for the exchange of clean syringes for used ones. I am aware of the identical debate in New Zealand at this time." Justice Kirby said.

REFORM OF DRUG LAWS

Justice Kirby said that the spread of AIDS through infected needles, together with the development of synthetic drugs (such as "crack") and the spread of criminal conduct by addicts to feed their drug habits might necessitate new "public health" approaches as a more effective means of controlling the use of drugs in society. He pointed to the "terrible toll" caused by legal drugs such as tobacco and alcohol.

Referring to drugs as the law's "nemesis", Justice Kirby predicted changes in the future:

"The difficulty of controlling gambling, commercial sex, alcohol, tobacco and other drugs in free societies arises because of the limited concept we generally have about the role of the State in protecting people from

themselves. Furthermore, there is a realisation that a very great price tends to be paid, in corruption of officials and cynicism about the law, as a result of the often ineffective, discriminating enforcement of the law on such topics. It would seem likely that our societies will move quite rapidly to an era in which drug use is regulated by the law primarily in terms of visibility. This has already occurred with alcohol, as with much commercial sex. There, although the actual damage done to society may at this stage be greater than by other drugs, the law has been content with the zoning, licencing, government checks against extreme health dangers as well as limits on public advertisement, hours of business, conduct in public places and availability to minors. There are many foolish things which people should not do. Smoking tobacco products, drinking excessive alcohol, even over eating and want of exercise may be mentioned. Yet there is a limit in the law's effectiveness to control people's private activities with efficiency and tolerable intrusion of officialdom. People outside the law have an exaggerated expectation of what the law can achieve. Such excessive expectations even stretch into the medical profession. It is important, when looking to the future role of the law, to disabuse those who hold such extravagant notions," Justice Kirby said.

FUTURE DEBATES

Justice Kirby said that the advent of highly expensive technology, such as CAT scans, necessitated decisions being made about the availability of medical facilities to only a

limited number of people. He said that it was important to recognise the "rudimentary cost benefit analysis which takes into consideration the differential value of human lives to different patients, their families and the community and the importance of quality of life, not just life itself." Justice Kirby said that economic choices could not be escaped either in medical or legal professions, and even influenced decisions affecting human life and death.

Justice Kirby cautioned against politicians rushing in with legislation on in vitro fertilisation or surrogate parenthood, without a clear understanding of the medical procedures involved and their potential utility to mankind:

"The latest research on Parkinson's disease and Alzheimer's disease suggests the possible utility of the use of embryo material directly transplanted into the brain. Just as with organ transplants, this development will pose moral issues. Is it better that embryo and foetal material derived from lawful abortions, be destroyed out of deference to the potential humanness of the embryo or foetus, or is it more useful to mankind that such material be used for medical experimental purposes? But if it may be used for such medical purposes, where then do we draw the line? Is it intolerable that such material should be used for facial reconstruction after serious burns? If this is accepted, as part of "medical" treatment, is it nonetheless intolerable that it should be used for the manufacture of cosmetics and commercial products designed to combat blemishes and ageing?" Justice Kirby said.

Referring to an announcement of the West German Health Minister that that country is to ban surrogate motherhood completely Justice Kirby concluded:

"That may be too impatient and too heavy handed. It may pay insufficient attention to the needs of childless couples and the more delicate balance which a just society 'seeking to avoid activity by good citizens outside unduly intrusive laws' will attempt".

Justice Kirby called for public discussion about the ethical questions presented to the legal and medical professions by advances in technology.

NOTE ON SPEECH

The above speech will be delivered at the Sheraton Hotel, Auckland commencing at 9.00 a.m. on Thursday 21 May 1987 in the Rangitoto Ball Room. For information contact Professor John Scott, Auckland 797440, ext. 373. For contact with Justice Kirby's office, telephone Sydney 230 8202.