THE ASSOCIATION OF AUSTRALASIAN AND PACIFIC AREA POLICE MEDICAL OFFICERS

SECOND MEETING, CANBERRA, MARCH 27 1980

FIRST CONFERENCE ORATION

LAW REFORM AND FORENSIC MEDICINE

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

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LAW IN A TIME OF CHANGE

The challenge of today is the challenge of change. At a time when so many institutions, laws and procedures are coming under question, it is difficult to be in the service of the community and particularly it is difficult to be involved in the administration of criminal justice. Perceived wisdom is questioned, long established lawsare passionately debated and the task of judges, lawyers and police daily become more difficult to perform.

To assist Parliament in the review, modernisation and simplification of the law, law reform bodies have been established in all parts of the English-speaking world. The idea may have originated at the end of the 16th Century when Sir Francis Bacon declared that the organisational weakness of the Common Law of England was in its dependence upon particular litigation to present the opportunity for reform and modernisation of the law. Bacon suggested a typically English solution to overcome this structural weakness. He proposed the

establishment of a committee which could take the whole body of the law of England into its hands and review it, as changing circumstances required. Bacon's suggestion was ultimately translated into action by the establishment of the Law Commissions of Great Britain in 1965.[1] The delay between 1597 and 1965 must be something of a record in inter-departmental consideration of a law reform proposal. But the Law Commissions having been established in Britain, the idea quickly spread throughout the Commonwealth of Nations. Now, in Australia, there are law reform bodies in every jurisdiction. The Commission I head is the national agency, devoted to the review of Federal and Territory laws.[2]

The Commission works upon references received from the Federal Attorney-General. This is in the nature of a guarantee against the Commissioners expending their efforts upon tasks which have no relevance to the law makers. There are at present four full-time Commissioners and six part-time Commissioners. The Commissioners are drawn from all branches of the legal profession: the judiciary, the Bar, solicitors, law teachers and government lawyers. Amongst the distinguished lawyers who have in the past served as members of the Commission is the Governor-General of Australia, Sir Zelman Cowen.

The Commission delivers reports to the Attorney-General, who must table them in Parliament within a short period. The reports therefore become public documents. To them are attached draft Bills, to facilitate the implementation of the proposals for law reform. Not only does the draft legislation help to avoid the bureaucratic pigeonhole. It also sharply focuses the reformers' zeal and requires close consideration of the detail which must always be addressed in realistic proposals for reform of the law, its institutions and procedures.

It has not been the lot of the Federal Commission in Australia to receive references from successive Attorneys-General on technicial or 'lawyers' law' issues. On the contrary, successive Attorneys-General of differing political persuasions have referred to the Commission highly controversial issues involving large questions of social

policy. For this reason, the Commission has exposed its tentative proposals for reform before the community, in advance of the delivery of a final report. Discussion papers are widely distributed. Public hearings are held in all parts of the country. Industry and professional seminars are conducted in every capital city. Public opinion polls and other surveys are administered. The defects in the law are debated in the public media. Radio, television, talk-back programmes and the like are frequently used to raise public consciousness about the law and to secure opinion on the way in which its reform should progress. It may be possible to commit to a group of lawyers, working alone, such issues as the Statute of Mortmain or the Rule against Perpetuities. Such a course would be inadvisable and undesirable where contentious questions of public policy are necessarily involved in the design of law reform.

Although the Commission aims at a high level of research, it is not an academic institution. It is part of the lawmaking process of Australia. It is an advisory body for the Executive Government and Parliament. Although its statute is silent upon what happens after a law reform proposal is made, it is a heartening sign that so many of the reports delivered by the Commission have either been implemented or are under close consideration for early implementation. There is no doubt that nowadays Parliament needs the best advice that can be procured if they are to be able to grapple with the complex problems posed by today's fast-moving society. If the law is to remain relevant to changing times, it is vital that it should keep pace with change. Law reform commissions, and specifically the Federal Commission in Australia, exist to help the lawmakers cope with the challenge of change.

FOUR THEMES

Before venturing on the identification of a number of specific topics of law reform relvant to forensic medicine, I wish to suggest four themes which describe the chief forces at work which will affect Australian society and its laws into the 1980s. These themes are big government, big business, big education and information and big science and technology.

So far as big government is concerned, we can all see the growth of the public sector and the increasingly important responsibilities it has to make decisions affecting every individual in society at various stages of his or her life. There will be no going back to the so-called 'good old days' of small government. Border skirmishes will be fought to rein in the public purse, to reduce taxation, to introduce 'sunset clauses' in legislation (by which a particular Act of Parliament will lapse after a given time[3]) and to limit and control the rapacious quango.[4] But I cannot foresee a return to the laissez faire society of the 19th Century. On the contrary, I believe that the growing integration of society and its recognition of responsibility for the poor, inarticulate, under-privileged members will, if anything, gradually increase the role of the public sector and its influence on our lives.

It is the recognition of this trend which has led governments of all political persuasions to develop protective machinery to stand up for the individual against the seemingly overwhelming and all-powerful bureaucratic state. Successive governments in the Commonwealth's sphere in Australia have reacted positively to the need to defend the individual against unreasonable administration. A national Administrative Appeals Tribunal has been established to hear appeals against administrative decisions made by Commonwealth officers. The Tribunal is empowered to hear such appeals 'on the merits' and generally to substitute for the bureaucratic decision what it feels to be the 'right or preferable' decision in the circumstances.[5] The Tribunal, headed by judges, sits in all parts of Australia. It has already built up a notable reputation for the independent and dispassionate scrutiny of administrative decisions.

In addition, an Administrative Review Council has been established to oversee the development of laws reforming administration. A Commonwealth Ombudsman (Professor Jack Richardson) has been appointed and his business expands daily. He now receives large numbers of complaints by telephone: an innovation which has promoted speed of attention to citizen complaints and an admirable cutting of red tape which secures prompt correction of bad administration.

It is expected that the Federal Attorney-General will shortly announce the Proclamation of the Administrative Decisions (Judicial Review) Act 1976. That Act, which has already been passed by the Commonwealth Parliament, contains a most important provision[6] to the effect that a person affected by the discretionary decision of a Commonwealth officer will in future be entitled to demand from him the reasons for his decision, his findings of fact and a reference to any evidence upon which he has relied. No more will the citizen be faced with a bland refusal. In the future he will be entitled to know why a decision affecting him has been made by a public servant.

Access to information is also a theme of other legislation. The Freedom of Information Bill, which is before the Australian Parliament, establishes the rule that in future people in Australia will generally be entitled to access to government information. Privacy legislation will be proposed in due course by the Law Reform Commission to ensure that individuals have access to information about themselves. A Human Rights Commission is proposed in a Bill before Parliament, precisely to test our laws against internationally agreed human rights. Similar developments are beginning to happen in all of the States of Australia. They reflect the reaction of the legal order to the growth of the public sector. Thirty years after Lord Hewart, the Lord Chief Justice of England, wrote 'The New Depotism', lawmakers and law reformers are putting forward effective, practical and accessible machinery to assert and uphold the rights of the individual against the administrator.

In a number of the projects of the Law Reform Commission, we have addressed this very problem. Our first report on Complaints Against Police[7] dealt with the provision of new machinery to permit independent review and scrutiny of decisions made by police in respect of public complaints about them. The Attorney-General and the Minister for Administrative Services have announced that the Commission's scheme, with some modifications, will be implemented in respect of the new Australian Federal Police. Already, the scheme has been adopted, in substance, in New South Wales.[8] Particular aspects of the Commission's recommendations have been adopted

In the Commission's latest report on Lands Acquisition and Compensation[9], shortly to be tabled in Federal Parliament, proposals are made to deal with the predicament faced by the individual when, under compulsory process, his property is taken by the Commonwealth for public purposes. The Australian Constitution did not incorporate a Bill of Rights. However, it did borrow from the Fifth Amendment to the United States Constitution one 'guaranteed right', namely, the promise of 'just terms' to persons whose property was taken by the Commonwealth for public purposes.[10] How do we translate this pious and abbreviated constitutional guarantee of 1901 into actual fair procedures for the handling of the human problems which arise when a person's home is suddenly resumed for an airport or a quiet suburban street is suddenly turned into a busy inter-urban highway? Addressing the practical problems of law reform, the Commission has proposed many new laws and procedures to translate 'just terms' into the requirements of the 1980s.

The second theme I have mentioned is big business. I will say less of this. But it is scarcely likely that the same disciplines which are now being developed and enforced as against big government will not, in time, come to the rescue of the individual against large corporations. They can be equally unthinking, oppressive and even bureaucratic. The problems of big business are somewhat different to the problems of big government. At least with big government, we share an ultimate national or sub-national identity. All of us have some control, however indirect, through the ballot box. But business can operate insensitively for its own purposes, without due regard for the needs of the country in which it operates. The ever-diminishing significance of distance and the ever-increasing speed and economy of international communications makes the development of international business both inevitable and, possibly, desirable. But there are by-products, which we will see more in the last decade of this century. For example, the efficiences which persuade electronic companies, motor manufacturers and others to centralise their research or other facilities in overseas countries may not benefit a small market economy such as Australia. A marriage of computers and data bases through satellite and other communication systems

presents the very real possibility that vital data on Australian individuals and businesses will be stored outside our country. This is a concern which is in the forefront of much European thinking at this time. With memories of invasions still fresh in mind, European leaders are sensitive to the external storage of personal data, sensitive or vulnerable data, data relevant to national security and defence and data vital to the cultural identity of a country. Although these concerns are not yet in the forefront of Australian thinking, I believe that they will, in time, become matters upon which we will have to reflect. They may require new laws to protect Australian national interests, for the interests of international and trans-national corporations do not always coincide with our own.

A number of the projects committed to the Law Reform Commission reflect the concern with the private sector. Our reference on consumer indebtednessll seeks to bring the law more into accord with current conditions of consumer credit. There has been a vast expansion of consumer credit since the Second World War. But the law dealing with this topic remains very much as it was in the times of debtors' prisons. As is so often the case, the law deals with particular symptoms (a specific debt) rather than with the underlying disease (an inability to handle credit). Similarly, our tasks relating to insurance contracts requires us to re-examine insurance contract law to bring it more into accord with a consumer insurance industry where, do what you will, you will not persuade the insured to read the details of his policy. A project of the Commission on class actions raises the question of the most effective means of providing legal discipline for large corporations where legal wrong has occurred. In the United States, it has been said that the class action to deprive corporations of unjust enrichment contrary to law is a more effective sanction than the criminal penalty.

To the forces of big government and big business must be added the impact of <u>big education and information</u> in Australian society. No one should be surprised at recent changes in moral and social values in society. The education figures make change inevitable. Widespread literacy and universal sufferage this

century have given people living in Australia the opportunity to interest themselves in community affairs. Education standards are steadily rising. The proportions of persons aged 15, 16 and 17 attending school, as disclosed in the last four censuses were:

Age	1961	1966	1971	1976
15	60.89%	73.74%	81.25%	86.43%
16	30.50%	42.45%	53.69%	59.13%
17	-	17.41%	29.17%	32.20%

Degrees conferred by Australian Universities have increased from 3 435 in 1955 to 8 731 in 1965 and 24 216 in 1975. Australians tend today to be more actively involved in the political process and in community activity than previously they were. Although our school retention rates are not yet comparable to those of the United States, Japan and many European countries, they are continuing to increase. Perhaps the most dramatic sign is the increase in the number of young women continuing their education beyond the age of 16. Within the past decade, the percentage has doubled. Our society is better educated and more inquisitive. It is daily bombarded with news and information, views and comment to an extent only made possible by the technological advances in the distribution of information. In short, in a fast-changing society, we have a better educated citizenry, liable to question received wisdom and accepted values to a degree that would have been unthinkable in previous generations. It is vital that these phenomena should be thoroughly understood by lawyers and those in the police service. Indeed, it is vital that they be understood by all. Not only do they help to explain the challenge to long-established laws and institutions. They also justify many of the questions which are now being asked. They require an answer and, to some extent, the readjustment of the relationship between lawmakers, lawyers and law enforcers, on the one hand, and society on the other.

SCIENTIFIC CHANGE AND LAW REFORM

The fourth great force for change is relevant to this Association. It is the impact on our society of big science and technology. In many ways this is the most dynamic of the forces for change and is the one which the law and lawmakers find most difficult to accommodate. I need go no further than the programme of the Australian Law Reform Commission to illustrate the way in which rapidly changing science and technology is having its impact on our legal system. In some cases, science and technology come to the rescue of the law. In other cases, science and technology present novel problems which can be swept under the carpet for a time but which ultimately require the attention of lawmakers. My thesis is not only that we must be alert to these forces for change, but that we must encourage bodies such as the Law Reform Commission to provide busy Parliaments and government officials with the best possible advice on the way the legal order can adjust to the challenges of technological advances.

Take first two cases in which technological developments have come to the aid of the legal process. The shocking toll of th road is a universal phenomenon of the post-automobile society. to natural and inevitable perils are added the special dangers which result from the conduct of intoxicated drivers, affected by alcohol or other drugs. It is not so very long since prosecution evidence, in cases involving drivers charged with driving whilst affected by alcohol, was confined exclusively to impressionistic evidence. Lengthy examination and cross-examination was required to test this evidence. Many of the disputes which revolve around impressionistic evidence of this kind were laid at rest by the introduction of blood alcohol analysis and breath analysis. How would we have coped, even as inadequately as we do, with the tremendous social problem of intoxicated driving, had it not been for the advent of breath analysis equipment? The Law Reform Commission was asked to report upon a number of defects which had become evident in the relevant law of the Australian Capital Territory. Its report Alcohol, Drugs and Driving[13] led to the enactment of a law, substantially adopting the great bulk of

the Commission's recommendations. As in all its tasks, the Commission had a panel of consultants who included Dr N.E.W. McCallum, Reader in Forensic Medicine in the University of Melbourne and Dr D.G. Wilson, Queensland Government Medical Officer. The Commission also had the closest support and assistance from officers of the Australian Police Forces, Federal and State. It concluded that the primary method of ascertaining the presence of alcohol in the body of a suspected person should be breath analysis, conducted by means of an instrument approved for that purpose. It urged, in particular, the use of the Model 1 000 Breathalyser, with its facility to print out the results of tests conducted by it. Attention was called to other breath analysing instruments now being developed and the need to continue comparative scientific evaluation of them.[13] To cope with the growing problem of driving impaired by the consumption of drugs other than alcohol, new provisions were suggested for medical examinations and the taking of blood and other samples necessary to identify the presence of other intoxicating drugs. The report acknowledged that this was a growing problem with which the law would have to grapple.[14] In the first paragraph of the Commission's report, the way in which the law would increasingly look to science and technology was frankly acknowledged:

> How is the law to deal justly and promptly with those members of society who potentially or actually endanger themselves and others by driving a motor vehicle after having consumed a relevant amount of alcohol or other drug? The question must be resolved in the context of our present law and practice in the administration of criminal justice. The answers will require an examination of scientific instruments that have been devised for the specific purpose of putting at rest many old court-room controversies. New questions are raised concerning the proper faith that may be put by the law in machines, given that the consequences may visit criminal penalties upon the accused. These questions point the way for other likely advances in the years to come. It is therefore important that at the outset we should get right our approach to these novel legal developments.[15]

The Australian Law Reform Commission's report on Criminal Investigation[16] also reflected the endeavour of the Commission to facilitate the use of science and technology to put at rest disputes relevant to the guilt or innnocence of the accused. A facility for telphone warrants for urgent police

searches and arrests was proposed.[17] This facility has now passed into law in the Northern Territory of Australia and there seems little doubt that it will be adopted elsewhere, as a means of retaining the benefit of independent judicial scrutiny of serious police actions, whilst acknowledging the special needs of police to act promptly in a country subject to the tyranny of distance.

Many other proposals in the report could be mentioned. One of them suggested the use of photography to record an identity parade and to place before the jury the way in which the accused was identified, where identity is in issue.[18] The common law acknowledges the special dangers of convictions based on identity evidence.[19] The need to protect against wrongful convictions on erroneous identification evidence cannot be met entirely by the facility of photography or video-recording. But a start must be made. Placing before the tribunal of fact, judge or jury, the actual evidence may be infinitely preferable to a courtroom debate, months later, concerning what occurred.

This principle applies equally to tape recording of confessional evidence. One committee after another, in Britain and Australia, has recommended the introduction of sound recording of confessions to police.[20] Nobody believes that tape recording could be introduced without problems and difficulties. Nobody believes that the tape recorder will be the complete answer to disputed evidence concerning what was said to police. But is there any doubt that in time sound (and probably video) recording of confessions to police will be used to put before the tribunal of fact the actual, alleged confession of the accused. Quite apart from official committees of inquiry, the courts are now, with increasing insistence, suggesting that tape recordings should be used.[21] The difficulty of courts resolving the discrepancies between sworn police evidence and the denials of the accused promote the suggestion by the courts that the time has come to introduce technology to help lay this additional controversy at rest. There is no doubt that disputes about oral evidence (and particularly the so-called 'verbals') do nothing for the relationship between law enforcement officers and the community

they serve. A most experienced Federal Judge, Mr Justice Connor, speaking at a recent international conference in Japan, spoke of the proposals of the Law Reform Commission that sound recording should be introduced for confessions to Federal Police in Australia. He expressed this view:

> As to the question of sound recordings, there is some police evidence to the effect that sound recordings of police interviews would inhibit the person being interrogated from saying anything. Perhaps only experience will show whether this is so or not. I am disposed to think that it is equally if not more inhibiting for a person being interviewed by the police to see and hear every answer being recorded on a typewriter; and yet it is notorious that many people do give and sign a typed record of interview. I am also disposed to think that if sound recording of interviews became the norm, in the course of a few years police might become the most ardent supporters of such a system. I think the sound recording of interviews would go a long way towards protecting the police from the kind of allegations which are almost routinely made against them by seasoned offenders. Sound recording evidence is convincing and enables the interview to be recorded in a way which is impossible for police officers to convey by subsequently reducing to writing such parts of the interview as they can recall. The use of sound recording for police interviews is not without its problems. There is the possibility of falsifying tapes. There may be a necessity to edit tapes. There is also the question of the custody of tapes. There is also the considerable expense involved in the provision of the equipment. If it were introduced there would no doubt be some growing pains but I believe that more and more people are becoming convinced that sound recording of police interviews must come.[22]

The Criminal Investigation Bill 1977, which is based upon the report of the Law Reform Commission, stops the talk. It introduces the facility of sound recording of confessions to Federal Police. Although the Bill is presently under reconsideration, including by the police themselves, the Attorney-General has said that it will be reintroduced into Parliament. I have said before that I believe it may be entirely appropriate that the Australian Federal Police should lead the way for the Australian police services in introducing and mastering this technological device. I repeat my view that, in time, recording of confessions to police will become a most powerful weapon in the armoury of the Crown to bring guilty accused to justice.

If science and technology present solutions to some of the difficulties of the modern administration of justice, they also produce problems, as a number of the projects of the Law Reform Commission demonstrate. None is more vivid than the work of the Commission on human tissue transplantation. The Commission's report[23] had to grapple with a number of the very difficult issues which are presented when medical science overcomes the normal tendency of the human body to reject transplantation of organs and tissues of another. The Commission had to deal, for instance, with the problem of the definition of 'death' for legal purposes. The common law approached this definition from the viewpoint of common sense. Although the laws of Australia and Britain have never attempted to define 'death' with precision and had left its diagnosis to the medical profession, it is generally accepted that the classical criteria for determining death were the cessation of respiration and circulation of the blood. Interpose an artificial ventilator in a modern hospital and these criteria become not only irrelevant but potentially mischievous. In the English case R. v. Potter[24], a man stopped breathing 14 hours after having been admitted to hospital with head injuries sustained in a fight with the accused. He was connected to an artificial respirator for 24 hours, after which a kidney was removed and transplanted. The respirator was thereafter disconnected and there was no spontaneous breathing and heartbeat. At the coroner's inquest, the question arose whether the accused had caused the victim's death. Medical evidence showed that the patient had no hope of recovery from the brain injury. The coroner's jury found that the removal of the kidney had not caused the patient's death. It returned a verdict of manslaughter against the assailant. He was then committed for trial but was later found guilty only of common assault. The unsatisfactory features of this case have left many lawyers with the conviction that the common law should be clarified to make it plain that death may be determined by reference to irreversible loss of function of the brain. The Law Reform Commission proposed that. Its proposals, in this respect, have been accepted in law in the Australian Capital Territory[25] and Queensland.[26] The issue is under consideration in the other States.

Equally contentious was the question whether a regime should be adopted by which all persons are to be taken as donors of organs and tissues for transplant purposes or whether a requirement of specific donations should be retained as a security against premature operations and to uphold the integrity of the individual and his control over his physical body.

Upon one matter within the Commission there was a division of opinion. It related to whether it should ever be permissible for non-regenerative tissues to be removed from living minors for transplant use. It was agreed within the Commission that the normal rule should be that in the case of non-regenerative tissues, removal from or donation by a living person below the age of 18 years should be prohibited by law. Two members of the Commission (including Sir Zelman Cowen) would allow no exception to this rule, believing that the existence of an exception would impose unacceptable pressures upon siblings or other relatives which would be avoided if the law, defending minors, prohibited donation in every case. The majority of the Commission took the view that subject to pre-conditions relating to independent advice and scrutiny by an inter-disciplinary committee headed by a judge, the family should be allowed to solve this crisis, without absolutist prohibitions of the law.27 The case illustrates the fact that in all matters of law reform, but especially perhaps where medical science is involved, men and women of goodwill can have all the relevant information and expertise, yet can differ fundamentally upon what the reformed law should provide.

Perhaps the task before the Law Reform Commission which most vividly illustrates the impact of modern technology on the law is that which requires the Commission to advise on new laws for the protection of privacy. There are many new technologies which affect the privacy of the individual in today's society. They include surveillance devices, electronic telephone tapping and listening equipment, optical means of surveillance and so on. But far more important is the impact of computers on individual privacy. In its capacities to collect vast amounts of information, to retrieve it at ever-diminishing cost and

ever-increasing speed, to integrate information supplied from many sources and to do all this in a form which is neither readily accessible nor understandable by the ordinary layman, the computer presents new problems which the law must seek to face up to and resolve. In Europe and North America, despite their differences of language and legal history, a generally common solution has been found. It is to uphold the right of individual access to automated personal data. Exceptions are provided for confidential and secret data, such as may be contained in national security and some police intelligence files. But it will be important, if we value individualism, that we in Australia, too, provide accessible and effective machinery to deal with this by-product of computerisation of society. Computers present many other problems that will be faced by the police. In a sense, they render society more vulnerable to terrorism and accident. Vital information may be destroyed much more readily where it is stored on a small computer tape. There was a certain protection in the inefficiency of paper files. The impact of computers on national sovereignty and on levels of employment in society will, likewise, have consequences that will require the attention of those who administer the law. The extent to which access should be required to Federal Police files is the subject of a research paper of the Law Reform Commission[28] Although a recent meeting of Australian Police Commissioners in Hobart is reported to have criticised access on the basis of the costs shown by United States experience, it is at least open to the comment that large numbers of people in the United States seeking access to factual police data about themselves suggests that a need may be felt in many quarters of society including among the law abiding for reassurance about police files, especially when they become computerised.

FORENSIC EVIDENCE AND LAW REFORM

Mr Justice Connor, in the address to which I have already referred, took a stand on the general desirability of the law facilitating proof of criminal guilt by means other than confessional evidence. His statement is, in a sense, an appeal for modern law reform to facilitate and encourage proof by empirical data rather than confessions of the accused:

> I think the quality of justice tends to be higher the less it is necessary to rely upon anything said by an accused in the form of an admission or a confession. In a system which facilitates the obtainment of confessions I think undue emphasis is likely to be placed upon that type of evidence. Confessional evidence is notoriously capable of constituting the best or the worst evidence, depending upon the quality of the confession. A confession to a crime which involves proof of a state of mind, if freely made by a resolute and rational but penitent person, is perhaps the best evidence obtainable. A confession by a frightened, illiterate person who is trying to shield someone else might be the worse evidence. I think there is much to be said for the proposition that a confession or an admission made to a police officer should be the start rather than the end of the criminal investigation. Well-trained detectives will certainly use confessional material as a springboard for further investigation in order to mount a strong circumstantial case which will be viable in the event of a confession not being admitted; and where the confession is admitted, it will tend to support the truth of it.29

In a number of the projects of the Law Reform Commission, we have addressed this issue. For example, in the report on Criminal Investigation, the question arose as to whether compulsory medical examination was of the same nature as compulsory oral confession. The Commission took the view that it was not. The one required the subordination of the body of a person to procure facts which, if properly verified, could be exculpatory or probative. The other involved overbearing the mind and will of the person and was to be seen as having a different quality. At common law, there is no power to require an arrested or suspected person to submit to a medical examination without his consent.30 This rule has been abrogated by statutes in most of the Australian States. But without specific statutory permission, the use of physical force by a member of the police force, a medical practitioner or anyone else to compel a person to submit to a medical examination or to furnish a body sample would constitute an assault and battery. When examining this question, the Victorian Chief Justice's Law Reform Committee recommended that the stringent common law rule should remain. Whilst conceding the possible need of compulsory examinations for particular offences, e.g., drug offences, the Committee concluded that:

> Very great legislative caution is proper when countenancing violations of individual integrity of the kind inevitably involved in compulsory medical examinations, and ... no provision in general terms - however hedged about with requirements that the force used be reasonable and so on - is ever likely to be appropriate.[31]

Whilst agreeing that compulsory medical examinations should be exceptional and carried out under the general requirement not to use excessive force or inhumane treatment, the Law Reform Commission took the view that compulsory examination should be permitted in the general regime of criminal investigation because it was likely, on occasions, to produce the best possible evidence and to discourage reliance upon confessions. For reasons similar to those expressed above by the Victorian Committee, the Commission proposed that procedural safeguards should be provided both to ensure against excessive use of this intrusive form of investigation and to provide the preconditions for protecting the medical officers involved against suit. The preconditions proposed by the Commission were:

> (a) The consent, acknowledged in writing, of the person concerned; or
> (b) A court order from a magistrate obtained after application supported by the affidavit of a senior police officer setting out proper reasons for conducting the examination.[32]

The scheme proposed by the Commission excluded the specific regime developed for detecting alcohol or drug-affected drivers. It distinguished superficial frisking from medical examinations by a simple criterion, namely, the removal of clothing:

> ...[A] search of the body surface, even if it is only for superficial scratches or bruises, should be construed as a medical examination to the extent that it involves any invasion of the modesty or dignity of the person concerned, as by shedding of clothes and so on.[33]

The proposals made by the Law Reform Commission in this connection were adopted by the Government in the Criminal Investigation Bill.[34] Subsequently, similar procedures for access to a judicial officer in the event of refusal to undergo a body search for customs purposes, has been introduced first administratively and now by legislation. A society which balances effective law enforcement and a respect for the dignity and privacy of the individual should have no fear in committing to a judicial officer cases where a dispute arises

The Criminal Investigation report also referred to the increasing use being made by Federal Police of forensic techniques. Instances cited included blood grouping and visual testing of particle samples and modern techniques including neutron activation analysis. It was acknowledged that forensic analysis may overlap medical examinations to the extent that the police may seek to require from a person in custody samples of his hair, nail clippings, skin scrapings, blood, semen or the like. The approach taken by the Commission was supportive of police and of this form of evidence:

> The principle against self-incrimination should not govern these procedures (nor indeed medical examinations generally, nor the use of fingerprints, photographs and the like) so as to rule out absolutely the possibility of such evidence being obtained. The probative value of this kind of evidence is such that it ought to be obtainable and admissible, provided that enforceable safeguards for the accused are built into the system.35

The safeguards proposed by the Commission included the requirements of consent or a magistrate's order. It was also proposed that there should be a right in the accused to apply to a court for a sample, where practicable, of the material in question so that the accused could obtain his own expert analysis.36

The report on intoxicated drivers required the Law Reform Commission to address many equally sensitive questions. One of them was whether random breath testing should be introduced. Another was whether universal blood sampling should replace breath analysis. On each of these issues, the Commission answered in the negative. In its report, the Commission provided for the taking of body samples and the conduct of medical examination of persons suspected of being affected by a drug other than alcohol. Breath analysis equipment so far developed is specific only to alcohol. The proliferation of other intoxicants in association with driving makes it necessary that effective law enforcement should have means of placing before the court the best possible scientific evidence so that it is not necessary to rely on lay impressions. It was proposed that medical examinations for the purpose of taking blood or other body samples should take place only in hospitals, although it should be pointed out that the report

was written specifically for the rather special community of the Australian Capital Territory.[37] Provision was made for the medical practitioner to refuse to take samples or to conduct a medical examination if he was of the opinion that to do so would be detrimental to the individual's medical condition, after a specified time lapse or if the person concerned refused to permit it. In the last mentioned case, the medical practitioner or a member of the police force must inform the suspect that unless his objection is based on religious or other conscientious ground, or on medical grounds, the refusal may itself constitute a serious offence.[38] Medical practitioners carrying out the tests are excused from the obligation to secure consent where the person involved is, by reason of his intoxication, incapable of giving it. Medical practitioners who properly comply with police instructions to conduct the examination are to be indemnified by the Commonwealth in the case of loss or damage. Although some medical practitioners expressed reservations about their use as part of the chain of the proof of criminal offences, having nothing to do with the treatment of a patient, the Commission believed that a great social harm done by intoxicated drivers and the necessity to put before the courts the best possible forensic evidence, warranted the facilities to police which have now passed into the law of the Capital Territory. It must be pointed out that in the case of criminal investigation generally, a refusal to consent could be overriden by a magistrate's authority. In the case of an intoxicated driver, it was thought sufficient to induce consent to a relatively unobtrusive medical procedure by providing severe penalties for a refusal which was not shown to be justified.

CHILD WELFARE AND CHILD ABUSE

Scope of the Problem. A number of the current projects before the Law Reform Commission require us to consider laws which do or may affect the medical practice. For example, our work on privacy protection raises the question of the right of patient access to medical and hospital files concerning himself.[39] Our latest Reference on the Law of Evidence in Federal Courts will require a detailed consideration of a

number of rules of evidence that concern medical practitioners generally and forensic medical evidence in particular. For example, although there is a limited privilege of doctor-patient communications in the evidence law of Victoria and Tasmania, there is no equivalent privilege in other jurisdictions. Some of the well-established rules of the common law will come under re-examination. For example, the rule that the evidence of children requires corroboration in some circumstances may not be found to be justified, in the light of modern psychological knowledge. The rules limiting the admission into evidence of 'similar facts', for example proof of previous similar crimes, may need to be extended in the light of modern understanding of probability theory.[40] But it is on the Commission's project on child welfare law reform that I wish to make a few concluding remarks.

There is no doubt that there is a need for significant improvements in the child welfare laws of the Australian Capital Territory. Specifically, there is a need to deal with a modern problem which is of legitimate concern to police medical officers. I refer to the problem of child abuse and how to fashion the reformed laws to cope sensitively with that problem. The precise measure of child abuse is difficult in Australia, certainly on a nationwide basis, because of the shocking state of crime statistics in Australia. I have previously had occasion to refer to the languid pace with which we are moving towards uniform, national crime statistics.[41] Part of the difficulty in the area of child abuse is the problem of securing an agreed definition of what is meant by this expression. In The Netherlands, which is unencumbered by the difficulties of a federal system, recent research has suggested that serious physical abuse of children occurs annually in some 1 200 cases. Some 120 children die as a result and another 150 sustain permanent physical injuries. In many cases, help for the abused child and the offending parents comes too late or not at all. Despite the increasing attention on child abuse in recent years, the offence is still regarded as a taboo.[42] The population of The Netherlands is comparable to that of Australia and our societies are not significantly different. But national figures in Australia might disclose an

even more serious incidence of child abuse than is disclosed in The Netherlands research project. The Inquiry into Non-accidental Physical Injury to Children in South Australia in 1974-75 showed a wide discrepancy between the number of cases officially reported and the number of cases revealed by the survey. On the basis of the figures disclosed, the Australian Royal Commission on Human Relationships estimated in 1977 the incidence of non-accidental physical injury to juveniles under the age of 15 years in Australia could be as high as 13 500 cases a year. This represents 37 juveniles injured every day in this country. Although it is possible that the number of cases of child abuse coming to notice of the Federal Police in Canberra is not as high, proportionately, as it is in the States (physical child abuse having an apparent relationship with poverty), many cases do exist and the police submission to the Law Reform Commission, criticising the current Child Welfare Ordinance 1957 (A.C.T.), called for specific provisions to be included in relation to the reporting of, and procedures to be adopted in relation to, complaints of maltreated children.43

Reasons for Non-Reporting. Some critics ask why more cases of child abuse are not reported to the police and other agencies.

> The failure of doctors to recognise child abuse for what it is and to do anything about it is still, I believe, partly due to the fact that as students they are not told sufficient about it. Doctors are unwilling to become involved. It is not sufficiently academic or challenging a situation perhaps - though what could present a greater challenge to one's skills? They refuse to participate in police or court activities. This is, in my opinion, an abrogation of responsibility.44

I do not find it difficult to understand the failure of doctors and others to report cases of child abuse. The whole thrust of medical ethics is to preserve the confidentiality that is so vital for an effective relationship between doctor and patient. The doctor's role is to heal. It is natural that he should resist becoming an adjunct of the community's administration of criminal justice. Furthermore, it has to be said that rightly or wrongly most doctors do not regard the police as agents for supporting and helping parents and children in the abuse

situation. On the contrary, they see the police as the agents of punishment and for that reason, withhold information to the police, except in the most serious cases.[45] Quite apart from scepticism about the utility of reporting to the police, there is a well-developed (and possibly partly justified) scepticism about the utility of legal process in dealing with conflicts such as this. A common feature of all family violence (whether directed to adults or children) is that the relationship between the parties, forged by blood, must normally continue. Police, welfare agencies and the law come and go, but the parties must continue generally to live together or at least in relationship to one another. It is this phenomenon that makes the law's intervention seem so ill-suited and inadequate to those whose responsibility it is to care for the injured victims of family violence. Some cases are so grave that they must be reported. In other cases, the law may do at least temporary good. But all too frequently, the law's impact is transient and aimed at specific recent conduct rather than the underlying personal or family problems, of which the conduct is but the latest symptom.

Added to these inhibitions are other restraints which are harder to define. The study in The Netherlands to which I have referred suggests that the taboo about inter-family violence and abuse continues because people dislike seeing it occur or disbelieve it when they see it.[46] Akin to the reaction healthy people have to people with handicaps, we respond with an atavistic desire to avoid contemplation of such unacceptable variance from the norm. We prefer not to see or, if we see, to excuse or explain the unacceptable evidence of physical or mental cruelty to a child.

COMPULSORY REPORTING

This is not the occasion to explore such solutions as have been tried to cope with the problems of child abuse. In New South Wales, a radical new scheme is being attempted, on an experimental or pilot basis, for the establishment of community justice centres. Modelled after developments in the United States[47], these centres, often manned by law students,

provide the courts and police with an alternative machinery of mediation and reconciliation to which they can refer appropriate cases, including at least some cases of family violence. Instead of seeking to deal with such a sensitive and usually intractable problem through court processes directed at a particular historical incident, the community justice centres will seek by more informal procedures of discussion, counselling and conciliation, to help parties to find solutions rather than to have a solution imposed upon them.

More orthodox approaches to the problems of child abuse include the provision of new police facilities, the assurance of 24-hour counselling and assistance agencies (for most cases of child abuse do not conveniently occur in office hours), the provision of a 'child watchdog' or youth representative, and so on.

Perhaps the most persistent debate in this area relates to whether compulsory reporting of cases of child abuse should be required by law of medical practitioners and others. In all of the 50 States of the United States, as well as in Washington D.C., Puerto Rico and the Virgin Islands, legislation of varying scope and impact requires that physical abuse of children be reported to some form of State agency. The consequence of this legislation has been at the very least, a better appreciation of the size and difficulties of the problem and the proliferation in the United States of a number of novel experiments in designing and providing child abuse facilities.[48]

In Australia, no such universal picture emerges from a study of State and Territory legislation. In four States (New South Wales, South Australia, Queensland and Tasmania) legislation specifically provides that medical practitioners have a duty to report where evidence of maltreatment comes to their notice in the course of their professional duties. The group required to report extends beyond medical practitioners in New South Wales, South Australia and Tasmania. In other States, a different approach has been adopted. In Western Australia, although there is no legislation for compulsory

reporting, there does exist a Child Welfare Protection Unit which is part of the State Department of Community Welfare. It began operating a parent Health Centre in January 1976. That Centre offers 24-hour crisis counselling and adopts a comprehensive approach to the whole range of support services needed in cases of child abuse. In Victoria, the Community Welfare Services Act was amended in 1978 so that people who report suspected child abuse cases are generally immune from legal suit for having done so. A recent suggestion by Dr J.P. Bush that Victoria should move towards compulsory reporting of child abuse cases was rejected by the Minister for Community Welfare Services, Mr Jona . and representatives of the medical profession. The Minister could not foresee any change in the Government's policy of preferring to encourage voluntary rather than compulsory reporting. Medical practitioners questioned whether compulsory reporting had done any good where it existed. Opposition does not come only from within the medical profession. Privacy bodies and others have questioned the utility of compulsory reporting. In respect of the Australian Capital Territory, the issue is now before the Law Reform Commission.

ARGUMENTS ABOUT COMPULSORY REPORTING OF CHILD ABUSE

Arguments against Compulsory Reporting. The arguments against a system of mandatory reporting of child abuse cases may be rehearsed. First, it is said that parents may be discouraged from seeking help, especially necessary medical attention, for injured children, for fear that seeking help may lead to police prosecution. Secondly, it is pointed out that if compulsory reporting leads on to prosecution, it may exacerbate rather than help solve the inter-family causes of violence. A parent may blame the child for the report and subsequent encounter with authority. Physical abuse or at least prolonged emotional maltreatment may be precipitated by the report of the case.

Thirdly, it is frequently said that compulsory reporting procedures are virtually unenforceable. A doctor who failed to report would rarely be prosecuted and almost never be convicted

by a jury, if he acted in good faith. Furthermore, the difficulty of establishing a case against the doctor on the uncorroborated evidence of the child would make prosecution extremely difficult. Fourthly, it is said that compulsory reporting of itself treats and cures not a single case of child abuse. It does not guarantee the provision of effective services and deflects the debate from providing those services to an obsessive and bureaucratic concern with collecting information rather than helping victims. Fifthly, it is pointed out that it is extremely difficult to define child abuse and to distinguish cases of abuse from cases of neglect, failure to thrive and simple selfish parental indifference. Critics fear that out of this vagueness about the target may emerge a community of spies and reporters who inform on their fellow citizens, ostensibly for their own good but often to satisfy an interfering disposition. Sixthly, it is proposed that a voluntary regime is preferable under which medical practitioners have a discretion but are under no obligation to do so. It is said that if a doctor is adequately protected against civil action by his patient, he should remain the judge of the best way to handle the situation and should not be submitted to an absolute obligation to report, whatever the consequences for the individuals involved.

Arguments for Compulsory Reporting. On the other hand proponents of compulsory reporting suggest that the time has come to stop talking in generalities about the rights of children and to act effectively to uphold them. In the clash between the integrity of the child and the right of the family to freedom from State interference, the community should give preference to protecting the child. This is not least because of the fact that usually the child is unable to complain for himself and should therefore be able to look to others and ultimately the community to protect him, even as against his family.

Secondly, it is said that unless a system of compulsory reporting is introduced, the practical result will be relatively little reporting, especially by medical practitioners brought up in the traditions of patient/doctor

confidentiality. Without a system of statutory obligation, reporting will be uneven, depending on the personal predispositions of particular medical practitioners.

Thirdly, supporters contend that the obligation to report provides a useful means by which the treating doctor can sustain his relationship of trust with the child and his family. The statutory compulsion explains and justifies the doctor's notification which is otherwise hard for a patient to understand and accept. Fourthly, although compulsory reporting will do little more, of itself, than improve the lamentable state of knowledge of the extent of child abuse, it is suggested that the very collection of information of this kind will impose proper pressure upon lawmakers to assure the provision of supporting services. At the level of the individual doctor, it will ensure that he has available to him multi-disciplinary assistance that can sustain his endeavours to cope with the difficulties of a child abuse case.

Fifthly, it is contended that a compulsory reporting system represents a public commitment to protecting abused children. It enables the community to become involved and has an educative effect and possibly even a sanctioning effect. Sixthly, opponents of compulsory reporting will not be deflected by the suggestion that it is enough to provide immunity from civil liability and to encourage voluntary reporting by doctors and others. If there exist only provisions for reporting together with immunity from civil liability, extraneous social considerations still operate to impede reporting of child abuse cases. These considerations include fear of, or actual imputations of, malicious interference by the reporter. Not only may this be unjust to the well-meaning reporter. It may also be likely to impede the fair assessment as to whether the case requires reporting.

Resolution. The Law Reform Commission's conclusion is stated in its discussion paper on this topic.[49] The claim that compulsory reporting legislation deters parents from seeking medical help has never been established by statistical information. Physical abuse tends to be triggered by crises

which, once passed, frequently lead to parental remorse and the seeking of treatment for the child. In the twelve months from July 1978 to July 1979, notification in New South Wales by a potential or abusing parent or by other parents or relatives constituted 13.3% of all notifications received. It is more likely that there will be self-reporting if supportive services are clearly identified and provide accessible, practical and expert assistance. The aim of these services should be to provide help, not to ascribe blame. There is no doubt that compulsory reporting is no panacea for the problems of child abuse. But no problem of this kind can be tackled if its variety, incidence and frequency are all but unknown. A procedure for compulsory reporting of child abuse cases in the Capital Territory is proposed by the Law Reform Commission as part of a comprehensive effort to improve the child welfare laws and procedures of that Australian jurisdiction.

CONCLUSION

Australian society is going through a period of rapid change. It will be an uncomfortable time for lawyers and police. In this paper, I have endeavoured to identify the chief forces which are promoting change and which will continue to do so in the decades ahead. The growth of the role of government, the expanding size of business corporations, the exponential explosion of information and the increase in community education contribute to a society in ferment. To all of these must be added the dynamic of science and technology. Many of the tasks before the Australian Law Reform Commission illustrate the impact of science and technology on Australian society. Some of them are of specific relevance to forensic medicine. The law, whilst keeping one eye upon the important values and rights that have been traditionally upheld, should keep the other eye on the needs of progress. The law will need to become more sensitive to the poor, the inarticulate and the underprivileged. It will also need to facilitate, under proper conditions, the availability of forensic evidence and the adaptation of technology to legal processes. This is an exciting time to be a law reformer. It is also a challenging time for police and for forensic medicine.

FOOTNOTES

* This is a modified version of the oration delivered by Mr Justice Kirby in the National Library, Canberra on 27 March 1980.

1. Law Commissions Act 1965 (U.K.).

2. Law Reform Commission Act 1975 (Cwlth), s.6.

3. The Human Rights Commission Bill 1979 (Cwlth) as amended in the Senate will lapse, if enacted, after five years, in default of Parliamentary continuance.

4. Quasi autonomous non governmental organisations.

5. Re Becker and Minister for Immigration and Ethnic Affairs (1977) 1 ALD 158,161; (1979) 2 ALD 60,69.

6. Administrative Decisions (Judicial Review) Act 1977 (Cwlth), s.13 (not yet proclaimed).

7. The Law Reform Commission, Complaints Against Police (ALRC 1) 1975. See also ibid, Complaints Against Police: Supplementary Report (ALRC 9) 1978.

8. Police Regulation (Allegations of Misconduct) Act 1978 (N.S.W.).

9. The Law Reform Commission, Lands Acquisition and Compensation (ALRC 14) 1980.

10. Australian Constitution, s.51(xxi).

11. The Law Reform Commission, Insolvency: The Regular Payment of Debts (ALRC 6) 1977.

12. The Law Reform Commission, Alcohol, Drugs and Driving (ALRC 4) 1976.

13. ibid., 125.

14. ibid., 131.

15. ibid., 1.

16. The Law Reform Commission, Criminal Investigation (ALRC 2) 1975.

17. ibid., 95.

18. ibid., 53.

19. R. v. Turnbull [1971] 1 QB 224.

20. For a list of the reports, see Kirby, Controls Over Investigation of Offences and Pre-trial Treatment of Suspects (1979) 53 Australian Law Journal 626,628.

21. See Sholl J in R. v. Governor of Metropolitan Gaols; ex parte Molinari [1962] VR 156,169; Gibbs J in Driscoll v. The Queen (1977) 51 ALJR 731,742.

22. Connor, Some Aspects of Arrest and Pre-trial Detention, paper for the 54th International Seminar of UNAFEI, mimeo, 1980, 21-22. For a recent case in which forensic evidence (blood grouping) shattered an otherwise compelling alleged oral confession, see Kellam, A Convincing False Confession (1980) 130 New Law Journal 29.

23. The Law Reform Commission, Human Tissue Transplants (ALRC 7) 1978.

24. (1963) 31 Medico-Legal Journal, 193. See ALRC 7, 58.

25. Transplantation and Anatomy Ordinance 1978 (A.C.T.), s.42.

26. Transplantation and Anatomy Act 1979 (Qld), s.45.

27. ALRC 7, 51.

28. The Law Reform Commission, Privacy Research Paper No.8, Federal Police Records, 1979.

29. Connor, 17.

30. Ex parte Kearney [1966] Qd.R. 306,311. See ALRC 2, 57.

31. Victorian Chief Justice's Law Reform Committee, Powers of Police After Arrest, 1972, para.29-33.

32. ALRC 2, 57.

33. ibid., 58.

34. Criminal Investigation Bill 1977 (Cwlth).

35. ALRC 2, 58.

36. ibid., 59.

37. ALRC 4, 131.

38. ALRC 4, 187 (cl.17).

39. The Law Reform Commission, Privacy Research Paper No.7, Medical Records, 1979.

40. See, for example, Makin v. Attorney-General for New South Wales [1894] AC 57. Cf. Snelling, Similar Acts or Facts as Evidence (1973) 6 Aust.J. Forensic Sciences, 78.

41. Kirby, address to the Fourth International Conference on Special Equipment for the Police, Canberra, 18 October 1979.

42. M. Bouwman, 'Abuse of children is usually the result of an inability to cope. Persistently loyal helpers required' digested in Abstracts on Police Science, Vol.7 No.2 (March/April 1979, para.446).

43. A.C.T. Police Submission to the A.C.T. Legislative Assembly Standing Committee on Housing and Welfare, 1976, 4. The submission was included in the submission to the ALRC.

44. Bush, paper for the Annual General Meeting of 'We Care', Melbourne, 26 November, 1979, 7.

45. ibid., 6.

46. Bouwman, op.cit.

47. Greenwald, 'Dispute Resolution Through Mediation', 64 ABA Journal 1250 (1976).

48. See, for example, the Baltimore County experiment described in R. Steen, 'Child Abuse Units in Law Enforcement' abstracted in Abstracts on Police Science, Vol.6 No.5 (September/October 1978), para.1210.

49. The Law Reform Commission, Discussion Paper No.11, Child Welfare: Child Abuse and Day Care, 1980 (forthcoming).