AUSTRALIAN COLLEGE OF HEALTH SERVICE ADMINISTRATORS

(S.A. BRANCH)

18TH ANNUAL GENERAL MEETING, THURSDAY 15 MAY 1980

HEALTH SERVICE ADMINISTRATORS & LAW REFORM

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

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The one thing I was not told when I came here tonight was how long I was supposed to speak for, so I shall just keep steadily in mind what Lord Birkett said was good advice in these situations - 'never worry when they look at their watches, it is when they shake their watches that you realise you have got to stop!'

I propose to speak tonight about matters which are of great concern to you as citizens and also, I hope, to pull together some themes from the work of the Law Reform Commission, on matters that are of specific relevance to the profession of health service administrators.

I want to advance, first of all, a fairly simple theme and it is that, at a time of unprecedented challenges to the legal system of our country, the institutions for the development and designing of the law are not terribly healthy. Let me try to illustrate that theme in two ways :

First, to identify some of the weaknesses in the law-maki institutions of Australia and then to identify some of the chief challenges to the law that promote the need for reform, modernisatic change.

First of all, in relation to our institutions, laws are made in countries such as ours, by three arms of government :

the Parliament, nowadays the chief maker of the law;

the Executive, under parliamentary sanction, makes some laws; and

the Judiciary has a distinctly subordinate but nevertheless real role, to develop the law.

The common law of England was brought to this colony by the English navigators, as it was to the other colonies throughout Australia. It was a pretty rude plant of a legal system; a plant which was nourished over hundreds of years by judges, designing laws, designing rules, to meet the particular cases that came befor them.

It used to be said that the legal system of England, whic we have inherited, had a dual genius. First of all, it was extremel clever in the way in which, by the rules of precedent, it promoted predictability, certainty, assurance in society.

If you wanted to know what the law was, you went to a precedent, you looked up a case which was similar, and you found out what the judge had said in that case, any by a process of logic, you tried to deduce what the law would be in another similar case.

But the Common Law of England had a second element of genius and that was, the capacity of the judges to stretch old preceder to develop them, to mould and modernise the rules of the past tc meet the needs of the present. Predictability and certainty in constant dialogue with change, modernisation, stretching develop ment.

With the advent of the representative parliament, in the last century, after the 2nd Reform Bill, the judges fell into a, not mortal but very serious, condition of judicial lockjaw. They were very much more circumspect in their development of the law, increasingly they would say "It's not for us, the judges, to develop the law, its a matter for parliament, we will leave it to the elected representatives of the people, with their wider powers of consultation, their more representative background, they are not as conservative and stuffy as we are, we will leave it to them to decide what the law ought to be".

In recent weeks, a series of decisions have come down from the H Court of Australia, the Federal Supreme Court of our country, which have shown the increasing resistance of that Court, at the apex of our legal system, to stretch and develop the law to meet new times.

Very briefly, I propose to give you three cases to illustrate this point :

These are live cases, for the law isn't a dull, dead, business, it is a business of resolving disputes between citzens and disputes between society and citizens.

Case No. 1 concerns a certain prisoner in Sydney, his name is Darcy Dugan - some of you may have heard of him. Darcy was convicted, many years ago, of a capital felony and, for that conviction he was sentenced to death. The sentence was commuted, he was released on licence after many years in prison, and whilst on licence, he committed another charge, another offence, and he was charged, convicted, sentenced again. The offence was bank robbery. In the course of the proceedings, a newspaper article appeared, alleging that Darcy had been guilty of rape. Now Darcy is a very moral sort of person, he said, "I may be a bank robber but I am not a rapist, that is a defamation and and lie, I am a very moral person"; for Darcy's morality was a sexual morality. So he wanted to take out proceedings and he commenced a case against Mirror Newspapers in Sydney claiming defamation. The newspaper raised a defence, they said "No, you were a prisoner who was convicted of a felony and we have looked up the old books and you have suffered corruption of the blood". This is not a medical condition but a legal condition of "corruption of the blood". "You have suffered 'attainder' and as a result of that you have no right of access to the Queen's Court - go away". That argument was upheld by the trial judge - case struck out. Upheld by the Court of Appeal and upheld by the High Court of Australia. The movement of our times towards human rights, towards international conventions, towards recognising people's rights, even prisoners to be a person in the eyes of the law, to enforce their legal

·laims, to have the rule of law administered in their case was put at nought. They'd looked at these old cases, looked at the old precedents, and thought the judges had made these precedents, they said "We will apply it to today". Of course, when the precedent was developed, a capital felon was on the foot of those steps leading to the gallows - he was as good as dead and there was no real point in his being able to go to the Courts. He didn have time. He could appeal his case but there was no real point in his getting involved in a civil litigation because in a few weeks time - 28 clear days - he would be dead. Remove one of the bases and you've got a new social circumstance - but the High Court remembered the first of the strengths of the Law and not, I suggest to you, the second - developing and moulding old preceden to meet new times.

The second case involved a woman of Adelaide - she was driving 40 km. north of Adelaide and she came into collision with a flock of sheep - she was killed. An action was brought and the defendant said, "We have looked amongst the old law books and in the law books there is this principle that the owners of straying cattle and sheep have got no obligation to fence them. It went to the Court here, it went to the High Court of Australia and it was contended that "Steady on, that was a principle developed for village England, when the fastest thing on the road was a horse anc dray."

"It's not suitable for today". But the High Court of Australia said, "It's not for us, unelected judges, to decide what the Law should be. It is for us to say what the Law is, this is somethinc which has been laid down, it is a precedent, we will apply it. We won't change". Case No. 2.

Case No. 3, involves a prisoner in Western Australia. He was charged with rape and he denied it. He said the woman had consented. He was put in gaol pending his trial, refused bail. He asked for legal assistance, he got a form, he saw a barrister and the barrister said "Fill out the form, we will get you legal assistance and I will appear for you". He filled out the form. A couple of weeks before the trial he began to get a bit edgy, he said, "Where is my barrister - I've got my case on - life imprisonment for rape - I deny it - I want to fight it". The barrister was summoned, he came out to the prison and said, "Oh, yes, I lost that form, fill out another form".

He filled in the form, the form went off to the Legal Aid Commissioner of W.A. The Commissioner heard the application the afternoon before the case and, of course, they had no funds - for things aren't all that good in the legal services either - massive slashes are talked of there too! They said, "We are sorry no funds, no legal aid". Then the barrister moved quickly - "no legal aid, no funds, no appearance - you're on your own - ask for an adjournment".

The prisoner, McInnis appeared before a judge of the Supreme Court of W.A. on a charge of rape, asked for an adjournment, "Your Honour, I asked for a barrister, went through this process, told me yesterday - I ask for an adjournment".

"No, get on with it, the Police are here, the Prosecutor's here, the complainant's here, the jury's here, the witnesses are here, you have half an hour to read the deposition - we will have the trial started in half an hour."

This is country I am talking about - this is Australia - this is our Legal System.

McInnispresented his case and was convicted and sentenced to six years in gaol - he's there tonight. He appealed to the Court of Criminal Appeal of Western Australia and, by a vote of 2 to 1, the Chief Justice of Western Australia, Sir Francis Burt, dissenti said "No, as untested by skilled counsel on McInnis' part, it w. a strong case". During the case McInnis was interrupted by the trial judge who said "Get on with it, you're asking a lot of irrelevant questions". He was criticised to the jury by the trial judge for having failed to put specifically to the complainant his version of the facts, as a barrister would have done - "Is it not a fact that you consented" - didn't put it in a technical way. After the Court of Criminal Appeal of Western Australia McInnis applied for special leave to appeal to the High Court of Australia - our Federal Supreme Court - the guardian of the Common Law of England in Australia. The High Court of Australia said, "No - no substantial miscarriage of justice - perhaps he should have given him an adjournment, but strong case - we won't interfere".

These are three cases - there are many others - where the judges, conscientiously doing their duty as they thought, according to their principles, were unwilling to develop the principles as they found them in the books. They had remembered the first genius of the Common Law of England - predictability of certainty, precedent, the books - they had forgotten that the Law, like society, is a living thing and requires modernisation, simplification, up-dating, stretching the new circumstances.

Just imagine if you tried to run a modern hospital with the rules that Florence laid down - well sometimes one thinks that's not a bad analogy for what happens in the Law.

Now, that would be all very well, if there were not, at the same time, the coincidence of tremendous pressures for change in the Legal System. The pressures come from many sources, one of them is the source of big government. The Law of England, or of Australia, was developed at a time when the role of government in a community was very small, now it is very large. The individual's place in the scheme of things may need new defences. This problem is now being attakced. Ombudsmen are being created to be the guardian of the individual; Administrative Appeals Tribunals are being created; new remedies of judicial review are being developed, freedom of information legislation is beginning to come. All of these things are happening or we have begun to react to what Lord Hewett called "the new despotism".

No offence meant, Mr. McKay, but government has grown and it is important, if we defend the individual that we should ensure that new, approachable, machinery is there to stand up for the little person.

The growth of big business presents many new problems for the Law; the changing moral attitudes, the different attitudes to the family evidence in the Family Law Act and the very steady business that th Family Court of Australia does; the new attitudes to sex and the new attitudes to drugs. These are radical changes in our society - they won't go away just because law-makers make a few laws. Our country's society is changing, but the greatest force for change

the one which affects your profession and which brings you into an interface with me, and that is the force of science and technology. This is the force that lawyers find most difficult to cope with because people who are good on Law, like me, tend to have been terribly good at school in things like history and English and poetry, and these sorts of things, and hopeless in mathematics and physical sciences and, likewise, tend to back off from problems like science and technology - but the problems keep coming.

Two of the tasks given to the Law Reform Commission illustrate this fact, in a way that is relevant to your profession. The first is the task we had on human tissue transplantation, for we were asked to design a law which could be used uniformly throughout Australia, for the transplantation of organs and tissues from one person to another.

The proposal we made was made with the assistance of a team of the t consultants, top doctors, anaesthetists, moral theologians, psychol gists and so on, around the country. We had the help of, from Adelaide, Dr. Matthews of the Renal Unit of the Queen Elizabeth Hospital. In the course of that task, we came upon many problems that medical science presents to the Law, on some of which we, even as Commissioners, divided. One of them was the question of whether you should ever permit donation by minors, that is to say, people lower than the full age of consent, to another - to a sibling. Should you ever permit it, or should the Law forbid it absolutely in defence of the child.

The Law, traditionally, stands as guardian of the child, stepping-i to prevent children from being put in positions of great pressure or undue influence, undue pressure, conflict, and so on; and on thi question the Law Reform Commission was divided. Sir Zelman Cowan, who was then a part-time Commissioner - before he took his other job in Canberra - and Mr. Justice Brennan, took the view, an absolutist view, that to defend a child from the undue pressures, within a family, of his family saying, "You've got to give your kidney to your brother", the Law should forbid it absolutely. What adults do, is their business, but the Law should stand as guardian of the child.

The majority of the Commissioners, including myself, took the view that, basically, this was a family crisis and absolutist positions were not appropriate - that each family would be facing its crisis in a different way and that, essentially, the Law did not have all that much to add to the family, except to make sure that the child was independently advised and that the necessity of the operation, the independent advice, the understanding of the donor, as well as the recipient, was fully shown to a committee - an interdisciplinar committee - headed by a judge. The view we put forward, the majority view, was accepted in Federal legislation for the Territor the view which was put forward by the minority, Sir Zelman Cowan an Mr. Justice Brennan, was accepted recently in legislation enacted i Queensland. I understand the proposals are under study in the othe States and, no doubt, different views will be taken.

The issue illustrates that, in matters of law reform, you can have all the talent in the country, all the best advice, all the information, all the facts, all the intelligence and you still reach different conclusions because often you are stretching back to your past and to your fundamental moral principles, and that was a matte on which there were very keen divisions within the Commission.

Another question was whether, if a relative wished, in his or her lifetime, to give their body, or parts of their body, whether after their death, the child should be able to veto it and say, "Well, it all very well for you to give it, in your lifetime, but you're gone and I'm here and I don't like the idea". Should a child be able t veto the gift, or is it part of the autonomy of the individual tha even after death, the wishes of the individual should be respected respect of its body.

Another question which we addressed was the issue of brain death. Because a case arose in England where an assault occurred; a person was brought into hospital, put on a ventilator, ultimately the switch was switched, the person died and the accused claimed that he hadn't killed the person, but that the people in the hospital had killed the victim because the Common Law definition of life is the circulation of the blood. That is what Village England tells u If your blood is circulating, therefore your heart's beating, that' common sense, the Common Law. Interpose a ventilator and you have new situation on which, if you apply the old books, you go back to the old principles and you pay no heed to the changes of technology which have occurred. You are not only lagging behind the times but you could be doing a positive mischief.

Another issue we had to address was whether we, like France, were ready for a regime under which every citizen, every person, is a donor, unless they opt out in their lifetime - unless they register an objection. Great advances in implantation technology have been pioneered in this City. Adelaide is, I think, famous as a centre throughout Australia in this department of operations. A lot of ou empirical work was done in the hospitals of this City.

So this was a question which we had to address and, in fact, we concluded that the Australian community wasn't ready for that regime, for many reasons, advanced in our report, it was preferable that a positive donation should be given, but we simplified the suggested procedures.

We gave a specific role for designated officers of the hospital to make the decisions, in consultation with a short list of relatives, at the critical time. Anybody interested in the Report of the Law Reform Commission can, no doubt, get it from the publishing service here. But, as I say, it is in operation now in Canberra and in Queensland and it is being translated into Spanish for use throughout South America. It is some time since we had a legal transplant to South America - but it is a sign that, in this country, we are not just farmers and miners, but there are great intellectual tasks including the Law, which we can accomplish.

The second reference we have is, perhaps, even more difficult, though the problems are of a different kind - it is the reference that brings me to Adelaide for the A.N.Z.A.A.S. Congress - it relates to the impact on our laws of the new information technology. Computers linked to telecommunications.

In terms of hospital records, the future is plain - more and more records will be automated. In this Hospital, I enquired, I am told, it has begun. It's begun simply, with mechanical administrative records - costing and things of that kind, but inevitably, as in the U.S. and as it has begun elsewhere in Australia, hospital records, medical personal data, will increasingly go into computers.

Now it is clearly recognised in all of the countries of the Western World, that computerising of records poses new challenges to the autonomy of the individual. There are greater problems for security. There is much more information that can be stored indefinitely - it can be retrieved in a flash, it can be retrieved at ever diminishing cost, it can integrate and aggregate profiles of people if it is linked - computers are linked, as is so easily done now, through telecommunications. It is in the hands of a new profession, it is not generally accessible to the ordinary layman. It is prone to centralisation of control. These are features of the new computerised society that pose dangers for the individual; for the threat to privacy in the 21st Century isn't going to be somebody peeping in your keyhole, it's going to be somebody peeping at your data file - your data profile. The profile upon which decisions will be made upon you, at every stage of your life - that's the threat to privacy in the 21st Century. It is recognised clearly throughout Europe and North America and it will come to be recognised in this country too.

The interesting thing about the task I had with the O.E.C.D. was that when we went to look at the legal systems of countries as different as Austria, Norway and the United States, Canada and the Netherlands; through the privacy protection laws ran a common theme. It was a remarkable thing, considering the differences of the legal background, language and culture, and history and so on - but the common theme was that, to defend the individual, in the computer age he should have access to data about himself. In other words, so tha he can perceive how others are seeing his data profile.

The common solution which was found in these countries was to give the individual a right of access to his own data - data about himsel personal data.

Now this runs into various schools of opposition - especially in countries of a somewhat secretive administrative tradition - as the British administrative tradition has tended to be. First of all it runs into the opposition of the national security people and defence - well that's universal and understood. It runs into opposition of police and it runs into very heavy opposition in the medical and health services profession.

In the United States, the Privacy Act of 1974 has been applied rigorously by the Federal Government. No hospital gets a cent of Federal funds unless, under the Privacy Act, it gives patients access to their own personal data. That is the way they do it in America - funding. And the net result is that, in the United States in most hospitals, patients have direct access - sometimes through intermediaries - to their personal data in hospital files, especiall now in computer files. It was suggested that there'd be the floodgates - the usual opponents of reform always talk of these old floodgates - but the officers of the Bureau of Medical Services in the United States reported to the President's Privacy Study Protection Commission, that in the first three years, in all the hospitals in the United States, there had been 3,000 applications for access. It neither led to as many claims for access, nor to the projected costs that were feared by those who said it would brir down good administration.

There are hospitals in Australia that have now begun a regime of open access to patients - they are principally in Melbourne but I am told that they're causing no problems and, indeed, the hospital

administrators support the notion.

I think this is going to be an important question which you are going to have to face in the next few years and I think you will have to bear steadily in mind the important general principle which has been internationally devised to protect the individual in automated data systems.

There are other tasks before the Law Reform Commission which bring us into contact with health care services. The latest upon which we are working, relates to Child Welfare Laws, and although we are dealing with it in relation to the Territories, because it's basically a matter of State law, we are working closely with State colleagues, including from this State and New South Wales. In this State there have been very important and beneficial developments in Child Welfare Laws which are now stretching their influence throughout the country.

One question which arose is the Hospital Holding Order in the case of suspected child abuse. In this State the period that a hospital can hold is the longest of any State in Australia (96 hours), in New South Wales, Queensland and Tasmania - 72 hours, Western Australia - 48 hours, A.C.T. - Nil. The question is, to what extent do we diminish the normal principle that a parent can't be deprived of a child and a child can't be deprived of his liberty? Without a Court Order, to what extent do we diminish that to combat the very sensitive and difficult problem of child abuse.

The question of compulsory reporting of cases of suspected child abuse is a question which is causing great agitation in medical circles in Canberra. There is no compulsory reporting there, at the moment, and one of the questions is whether to combat child abuse and the general disinclination of the medical profession to bring it to notice; we've got to combine both more sensitive legal redress and an obligation of compulsory reporting. There is, of course, in this State, an obligation on certain professionals - medical professionals, dentists, nurses, police and departmental officers - to report cases of suspected child abuse that come to notice.

The obligation was introduced in New South Wales, last year, I think and I'm told there has been a radical increase in the number of reports, but principally not from the medical profession.

Doctors appeared before us, in a public hearing in Canberra, and said, "Well, I don't like to say it, but whatever you do, whatever the Law says, I'm not going to report them, I'm not going to interru the essential private nature of the relationship between a doctor an a patient.

Supporters of child abuse compulsory reporting say it is the only way somebody can be made to stand up for the child; that the conspiracy of silence must be stopped and the obligation must be impose which the doctor, or the hospital, can't escape. It gives them the protection against the patient - that they can say, "Well, look, I don't want to do this but I'm obliged".

On the other hand it is said that, with our heavy-handed legal machinery - what good is done? You divide the family, the child is blamed by the family and you simply perpetuate the mistrust and the causes of abuse. It is often said that we, in the Law, always look at the latest symptom and never the underlying problem. Well, that a question upon which we have not yet reported.

If there are people in this audience who have views on it, I hope that they will write to me in Sydney and give me their views. I wo be especially interested to know how the law is operating in this State.

The question of clinical trials, the question of the right to die, are matters that are going to exercise the attention of the Law in the next few years.

In fourteen States of the United States, largely as a reaction to the Karen Quinlan case, legislation has been enacted affording people the opportunity of making what is called a "Living Will" - the entitlement to say, during your lifetime, that "If the only way to sustain me is by extra-ordinary medical care, I don't want it, let me die". And the legislation has been enacted in these 14 States, and I understand that large numbers are availing themselves of it.

It may be that, for wrong reasons, it will be pressed upon us - I d hope it's not as a 'cost slashing exercise' but the concern is undoubtedly there and legitimately there.

The fear within medical circles of euthanasia and the enthusiasm with which the German medical profession, with all of its distinctic joined in the Nazi experimentation in euthanasia, have made us very wary and I think we are going to see more of the issue of the right to die in the next few years.

Our latest reference we have is on the Law of Evidence and that seer very remote to health care administration, but one of the problems : you can't cross-examine a computer. The question of hearsay evidence may have to be significantly changed in order to permit cor puterised evidence, made in the normal course of operations of a computer, to be tendered in Courts without having to call the original maker of the record. Because, often, let's face it, you won't know who the original maker of the record was - or, if you do know, you won't be able to get them.

Computers, into which so many people make their input, will be much r difficult to test and the problems for a fair trial will be far greater.

The question of the subpoena of documents to Court; whether notice should always be given to preserve the privacy of the patient, so that the hospital is not in the position of being obliged to breach that privacy by giving the documents to the Court without notice to the subject. The haemorrhage of private information from hospitals is very much the business of the Law itself, with its own subpoenas. I think this question is going to have to be addressed.

The question of the privilege against giving certain information. Th lawyers look after themselves as complete privilege - can't cross-examine the lawyer - but the issue is whether we would abort the just determination of cases if a similar privilege were conferred upon doctors, dentists (as it is in some States of Australia and in the United States and Canada), on health care administrators, health officers, generally, the nursing staff - where would you stop and wha is the correct principle here for extending the privilege against having to give information under process of Law.

Fu re tasks which may come to the Law Reform Commission include the question of artificial insemination, in-vitro fertilisation, the use of pituitries - the human pituitry from the coronor's corpse - at th moment it is not always put back because it is terribly useful in th production of serum for use in combatting dwarfism - but it is part of the body. At the moment the Law turns a blind eye because the net good to society is enormous and the net harm to proper legal principles is pretty small - why bury it, why burn it and yet, if the integrity of the body of the human being is, as it were, to be upheld by the Law, as a shadow of the person in his lifetime, then t question arises as to what the Law ought to be and should it be honoured in the breach.

There are many other tasks which lie before law reformers, which wil bring us into contact with your profession.

In preparing for this address I learned something about your profession and I have had the opportunity of speaking to the Federal Conference before. I am always delighted to come into contact with the medical profession because I realise, from my obligations, the tremendous challenges before you.

It is clear that challenges before the Law are greater today than ever before. They are principally coming from medical, scientific, technology. Our old institutions of law making are not proving competent to deal with all the challenges. Parliament, with its boarding school rules of bells and buzzers, and people being put on and off planes, is what Professor Gordon Reade called it - "A weak ar weakening institution". The major beneficiary of the loss of its power has been the executive government but the executive government is distracted by day-to-day political events, from making the 'nuts a bolts' of the Law.

The judges, who used to make the Law, in its minutiae, are now, as I have illustrated to you, increasingly disinclined to do so.

It is because of this weakening of our institutions that law reform bodies are springing up everywhere. There is a distinguished Law Reform Committee in this State, under Mr. Justice Zelling. But they are all ill-funded, under-manned resources, which do law reform, as it were, 'on the cheap'. In our "Evidence" project, we will have one commissioner and one researcher.

In the United States, a similar exercise had a team of 200 - but you have to improvise and so do we - and we keep an optimistic spirit because the dangers before our community of a breakdown of its legal institutions are too terrible to think of.

Well, that's what I came to speak of tonight - a somewhat sombre address for your meeting but, both as hospital administrators and as thinking citizens, you should turn your mind to these problems.