

319

WORLD HEALTH ORGANISATION

INTERNATIONAL DIGEST OF HEALTH LEGISLATION

REVIEW OF 'LEGAL ISSUES IN MEDICINE'

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

March 1982

WORLD HEALTH ORGANISATION

INTERNATIONAL DIGEST OF HEALTH LEGISLATION

REVIEW OF 'LEGAL ISSUES IN MEDICINE'

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

LEGAL ISSUES IN MEDICINE (ed. Sheila A.M. McLean), Gower Publishing Co. Limited, Great Britain, 15 articles by various authors, with a note on contributors, a Foreword, Introduction and Table of Cases (i-xiv, 1-219).

This book contains fifteen essays on as many subjects of current medico-legal concern. It has been written by authors with backgrounds in law, jurisprudence, philosophy and medicine, most of them associated with the University of Glasgow or other Scottish universities. Although most of the contributions concentrate on United Kingdom legislation, there is discussion of separate provisions of Scots law and occasional reference to United States and European cases and regulations. The editor, in her introduction, expresses the hope that the book will contribute to the debates about modern medical practice and especially 'by examining some of the fundamental assumptions which have tended to underly the traditional legal and community responses to dilemmas in medicine'. In this sense, the book, though written by multiple authors and in an entirely different style, make an interesting contrast to the recent publication of Dr. Ian Kennedy's expanded Reith Lectures, 'Unmasking Medicine'. There is not in this book the same evidence of a consistent theme. Nor, it must be said, is the book written for the layman. It is dense both in its content and presentation.

A reference to the subject matter of the contributions will indicate the range of topics covered. They include 'Collective Responsibility in Health Care'; 'The Occupational Physician and the Law'; 'Medicine and the Community'; 'World Health and WHO'; 'Life Animal Studies'; 'Medical Products Liability'; 'Professional Liability'; 'Consent in Medical Practice'; 'Medical Progress and the Law'; 'Medical Genetics and the Law'; 'Ante-Natal Injuries'; 'Artificial Insemination'; 'Sterilisation'; 'Sane but Abnormal' and 'The Expert Witness'.

The essay by Dr. Sami Shubber, a senior legal officer for the World Health Organisation, describes the structure of WHO, the various measures through which, under its constitution, it is seeking to achieve its objectives and the procedures for international liaison in health care. The successes accomplished by WHO are the more remarkable because, as the author points out, the Organisation possesses no machinery for scrutinising the national actions of Member States with respect to treaties, regulations and recommendations adopted by the World Health Assembly. The only means of measuring compliance with internationally agreed standards is the obligation of annual report by member countries. In the light of this loose legal structure, as explained in Dr. Shubber's contribution, the impact of WHO is all the more remarkable. The total eradication of smallpox and the many other projects being carried out are listed. One suspects that the achievement of WHO is directly attributable to the overwhelming contribution of health care professionals with only a modest contribution by lawyers and the principles of public international law.

It is not possible in this short note to review each of the articles making up this work. Each is about ten pages in length, accompanied by lengthy end-of-chapter footnotes with detailed reference to legislation, case law and medical texts which make the references an excellent source bibliography of United Kingdom material especially concerning medico-legal questions. There is a notable lack of reference to Antipodean writings. However, in some of the articles there is a useful discussion of United States medico-legal developments. An instance of this is in the piece by S.A.M. McLean and A.J. McKay, 'Consent in Medical Practice', where United States developments of the concept of 'informed consent' receives brief treatment.

The articles of greatest interest to this reviewer are those which touch upon the implications of advancing medical technology for the law. Thus, in the piece by D. Soutar and S.A.M. McLean, 'Medical Progress and the Law', there is a very interesting analysis of a number of topics including clinical trials and the use of new techniques such as heart or other organ transplantation. The following essay by M.A. Ferguson-Smith, 'Medical Genetics and the Law', is made especially relevant to English-speaking countries by the recent attention on the position of the responsibilities of medical officers in the case of children born grossly and irretrievably deformed or mentally retarded. The decision of the Court of Appeal in England in the case of Re B (a minor), Times Law Report, 8 August 1981, p.14 and the trial before a jury of Dr. Leonard Arthur, both occurred after the piece by Dr. Ferguson-Smith was written. The implications of genetic counselling and the range of pre-natal tests described by Dr. Ferguson-Smith are inherent in the discussion by the English Court of Appeal, even more recently, of whether a child may bring a cause of action against medical staff alleging 'wrongful life'. The English Court of Appeal rejected this contention.

See McKay v. Essex Area Health Authority & Anor, Times Law Report, 20 February 1982, p.21. However, in the United States actions have successfully been brought by children and parents against doctors and even by children against parents themselves claiming 'wrongful life'. There is a useful discussion of these issues in a recent book published in Australia, S.C. Hayes and R. Hayes, 'Mental Retardation, Law Policy and Administration', Law Book Company, Sydney, 1982.

As a footnote virtually to the conclusion of his piece, Dr. Ferguson-Smith calls attention to, without discussing, the 'newer areas of medical genetics, such as in vitro fertilisation, gene therapy and genetic engineering'. He claims that these are at too early a stage of development to be usefully considered. But the fact is that the medical technology is presenting lawyers with the problems, ready or not. In Australia there are already 15 births, the results of embryos conceived in vitro. There is a roughly equivalent number in Britain and the first such birth in the United States was recently recorded. The problem is therefore already with lawyer and with the community.

Among the issues that will have to be addressed are : should in vitro fertilisation proceed at all, having regard to the very great costs and the competing use of the medical dollar? Should it proceed at all in the face of opposition from 'right to life' groups who object to manipulation with such a basic form of human life? Should it be available only to married couples or those with settled domestic relationships? Should it be possible to freeze the fertilised embryo for later use? What consequences follow the death or divorce of one of the donors? Should it be possible to preserve the frozen embryo for hundreds of years, as is said to be technically possible? If so, what will be the consequences for the passing of property and for the identity of the child born in a later age? Should surrogate parenthood be permitted and if so, with what respective rights of the surrogate and of the donor parents? These are just some of the questions that are already presented by the advent of children conceived in vitro. In March 1982, the Government of the State of Victoria in Australia announced the establishment of an interdisciplinary committee to examine these issues. The committee will be chaired by the Victorian Law Reform Commissioner, Professor Louis Waller.

Although there are many topics that could usefully have been dealt with in this book and which are left unattended, that is not a criticism of the collection but a statement of the variety and complexity of the questions that are raised today by medico-legal developments. This book is a useful contribution to the field. My only significant criticism relates to the absence of an index.

Whatever may be said concerning the need of an index in books of scholarship generally, that need becomes imperative where there are numerous disciplines collected together, numerous authors and cross-reference to issues in various articles from different perspectives. I believe the book would have been more valuable and the interdisciplinary features of it used to greater advantage, if an index had been provided.

M.D. KIRBY