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On 22 September 1990 an important medico-legal conference was held at the Hilton Hotel, Brisbane, sponsored by the Faculty of Law of the Queensland University of Technology (QUT). Medical and legal experts examined a number of difficult problems relevant to the interaction of their two professions and to the delivery of health care services to the community.

Participants in the conference were welcomed by Professor David Gardiner, Dean of the QUT Faculty of Law. Professor Gardiner expressed pleasure at the participation in the conference of Associate Professor Suzie Laufer of Bond University. Within that University, Professor Laufer has taken a leading part in teaching the law as it relates to the delivery of health care.

The conference was opened by Mr Ken McElligott, Queensland Minister for Health. He stressed the complex questions which are raised by the health portfolio today and the difficulties faced by the political process in resolving ethical questions of high controversy. He said that it was important for solutions to be based upon good data. He stressed the necessity of accountability of the professions. In this context he outlined the non-legislative steps that have been taken to establish a patients' complaint unit in respect of public hospitals in Queensland. He said that the

question of whether this facility should be extended, by legislation, to the private sector was currently under review. The Minister committed the Queensland Government to consultation with the medical profession. He welcomed the conference as a contribution to that process and emphasised the participation in it of senior officers of his Department.

The Chairman of the conference was Justice Michael Kirby, President of the New South Wales Court of Appeal. Justice Kirby outlined the experience and techniques of the Australian Law Reform Commission, in which he had first tackled some of the issues of the law and bioethics. He said that the Commission's early report on Human Tissue Transplants (ALRC 7, 1976) had not only been influential in its own right. It had also demonstrated a technique of public and expert consultation which could provide solutions to the most difficult issues, including those presented by the advance of medical technology.

The first session of the conference concerned the intellectually disabled patient. Justice Kirby said that the fundamental difficulty in this connection stemmed from the central obligation of consent by which patients permit the performance of medical procedures upon themselves. The difficulty of obtaining an informed consent from some intellectually handicapped persons presented the law with dilemmas both of procedures and of standards by which such decisions would be made on their behalf by others.

Mr Hugh Carter, the Legal Friend appointed under the

Intellectually Disabled Citizens Act 1985 (Qld) outlined the procedures for the provision of consent for intellectually handicapped children and adults both under Queensland legislation and comparable legislation in other States. He drew attention to a series of decisions of the Family Court of Australia relating to applications for consent for non-therapeutic hysterectomies of young females whose parents favoured the performance of the operations to prevent pregnancies. In two decisions, single judges of the Family Court had held that parents may give valid consent. But in two others, the Court had emphasised that such consent must be authorised by the Family Court based upon the prima facie human right to reproduction which would otherwise be lost if the operation were performed.

The procedures for emergency consent to urgent operative treatment where a mentally handicapped person faces a life-threatening condition were outlined, as were the two basic principles provided by the law for the protection of health care workers acting bona fide in the best interests of the patient. These are the common law implication that consent would be given in emergency situations for remedial therapeutic treatment and the ultimate power of the Supreme Court to exercise its parens patriae jurisdiction for the benefit of disabled persons.

Justice Kirby pointed out that English cases on the performance of operative treatment on intellectually handicapped neonates, who without operation would die, had

stressed that the criterion for action must always be the "best interests of the patient", not the interests or wishes of the parents or guardians or the concerns of society as to cost or otherwise. However, he said the real difficulty was presented by the lack of clear criteria by which those "best interests" could be determined. It had been suggested in Re B (1981) 1 WLR 1421 that surgical intervention which could save the life of a handicapped child should be withheld if it were shown that its life would be "demonstrably awful". But Justice Kirby pointed out that opinions as to awfulness and its demonstration could vary from one legal or medical decision-maker to another.

In the second session, Mr Peter MacFarlane, a member of the QUT Faculty of Law, addressed the issues of death and dying. He pointed out that in Queensland, and some other States, there is no statutory definition of "death" for all purposes, although Queensland had followed the ALRC report by offering a definition of death to include loss of brain function, in the special context of transplantation. He said that the absence of a general definition might sometimes be remedied by common law decisions in particular cases. See eg R v Kinash [1982] Qd R 648. But the lack of a general statutory definition of "death" exposed medical practitioners, who failed to adopt heroic procedures, to the risk of civil litigation and even the possibility of criminal prosecution.

Whereas many opinion polls, both in Australia and other

developed countries, showed a growing body of opinion in favour of at least "passive" euthanasia, the state of the law in Australia did not countenance positive conduct to assist even terminally ill patients to die.

Mr MacFarlane outlined the legislation in Victoria, South Australia and the Northern Territory providing for "natural death", that is to say compliance with the valid instructions of a terminally ill person not to use artificial or extraordinary means to support or prolong life which would otherwise end naturally. He said that the enactment of such provisions might be considered for Queensland. However, following the experience in other States, it was appropriate to ask whether legislation should be confined to forbidding "extraordinary" treatment. In the context of palliative care, Mr MacFarlane said that it was appropriate to reconsider the law where therapeutic decisions must daily be made which effectively hasten the death of the patient but can be justified for the relief of pain or for other medical reasons.

Justice Kirby pointed out that, apart from the state of substantive law, a number of legal and practical considerations combined to protect health care workers' bona fide dealings with these problems. He mentioned the usual difficulty of securing evidence relating to individual treatment decisions; the difficulty which a prosecutor or litigant would have in establishing the essential chain of causation or the presence of a criminal intent; the prosecutorial discretion which exists to determine whether

particular conduct or omissions will be the subject of a criminal charge; the obligation of the Crown to prove its case beyond reasonable doubt; the general presumption of innocence favouring the accused; and the experience that juries tend to acquit health workers who have been shown to have complied with standard professional procedures. In this connection, Justice Kirby mentioned the trial in 1983 in Leicester, England, of Dr Leonard Arthur for "palliative" treatment of a retarded neonate and his acquittal.

There then followed a session on expert evidence. Introducing it, Justice Kirby pointed to the fundamental principle that opinions were not admitted into evidence because hearsay evidence is, prima facie, inadmissible, except when offered by a qualified expert within the scope of proved expertise. He stressed that experts could not give evidence outside their established field of expertise; of matters of common knowledge; or on the "ultimate issue". That issue must be left to the legal decision-maker, whether judge or jury. But the Chamberlain trial had demonstrated the difficulties faced by lay tribunals when confronted with conflicting medical expertise or technical evidence. The special problem of bias in medical witnesses hired as "mercenaries" was mentioned and the practical problem presented to the decision-maker when experts give diametrically opposed opinions. But Justice Kirby pointed out that decisions must still be made in difficult cases and the courts have been coping with this problem, despite the

changing state of specialist knowledge, for virtually the whole history of the common law.

Dr William McGuire, an orthopaedic specialist of Brisbane, spoke from the perspective of thirty years practice during which he had given expert testimony on countless occasions. He said that it was rare for lawyers to challenge the qualifications of medical "experts". But from within the medical profession it was well known that the proper solution to problems frequently required a high degree of specialisation making general opinions of qualified practitioners, who did not have actual knowledge of the particular area of expertise, dubious and unreliable.

Dr McGuire stressed that in medicine there was "no never and no always". Dogmatic opinions were therefore generally unsound. However, the best opinion would be based upon a good history told by the patient without leading questions or undue hurry. He said that it was important for experts to maintain their objectivity both for their own integrity and in order to be of assistance to the court.

Mr Peter Channell, solicitor, Brisbane, reviewed the authority of Australian courts on the limits of expert evidence. He stressed that an expert opinion was only as good as the factual premises upon which it was based. The record of facts in a medical history did not constitute evidence of those facts; but was available for the cross-examination of the patient on the history given or as to admissions against interest. Mr Channell and other

lawyers present at the conference called attention to the alteration of the adversary system presented by the obligation in the new court rules to notify the opponent of medical reports obtained. It was pointed out that this changed the usual function of the lawyer which was normally confined to advancing his or her client's case and (subject to ethical rules) not putting forward evidence which would damage that case.

The last sessions of the conference were chaired by Dr Jean Collie, Director of the Division of Research and Planning in the Queensland Department of Health. Dr Keith Adam, an officer of the Department outlined the role of the health care professional as an adviser on health and safety. He emphasised the need for a more preventative focus in the approach to health care. However, he acknowledged that this led to a number of medico-legal difficulties. For example, problems of confidentiality could arise where a safety adviser found elevated blood lead levels in regular tests. Conveying this information to an employer might be essential for remedial steps to be taken; but it could lead (if the patient were identified) to termination of employment. The extent to which a medical practitioner is obliged to have foresight of the risks of injury being caused by a patient and to warn others of those risks was examined by reference to the possible extension to Australian jurisdictions of the development of the law as stated by the California State Court of Appeals in Tarasoff v Regents of the University of

California [No 2] (1976) 551 Pacific Reporter (2d) 334.

In the final session, Mr Merve Stubbins, Chairman of the Queensland Health Complaints Unit, outlined the development in the last decade throughout Australia of independent units for the resolution of complaints in respect of the provision of health care. He outlined the steps taken by the Queensland Cabinet to establish a working party to investigate the necessity for legislation in Queensland. He explained, as a model, the functions and powers of the Health Services Commissioner in Victoria. The Victorian legislation stood as one precedent for consideration in Queensland and other Australian States.

The conference provided a useful opportunity for a meeting of the Minister, lawyers, medical practitioners and public health officials. The need for further such dialogue was emphasised by many participants.