

FOREWORD

ETHICS, LAW AND MEDICAL PRACTICE

The Hon Justice Michael Kirby AC CMG

1394

FOREWORD

ETHICS, LAW AND MEDICAL PRACTICE

The Hon Justice Michael Kirby AC CMG*

Four experiences in my life have enlivened my interest in the subject matter of this book.

My appointment to the Australian Law Reform Commission required me, for a decade, to examine many topics relevant to law and medical ethics. The Commission's report on *Human Tissue Transplants* (ALRC 7, 1977) considered a number of sensitive questions connected with transplantation of organs and tissues. The report on *Child Welfare* (ALRC 18, 1981) examined circumstances justifying breach of medical confidentiality and an obligation to report suspected cases of child abuse. The report on *Privacy* (ALRC 22, 1983) studied numerous questions about medical data, in the particular context of modern information technology. The report on the law of *Evidence* (ALRC 26, 1985)

* Justice of the High Court of Australia.

examined the demand for a privilege for medical practitioners to withhold, from courts, sensitive information obtained in the doctor patient relationship.

In the report on *Human Tissue Transplants* (at p 7), the Law Reform Commission noted the varying attention to medical ethics in undergraduate medical courses in Australia. In one State, a little more than an hour of instruction in the entire course was devoted to the subject. In others, greater instruction was given. The Commission concluded that the moral and ethical questions raised, particularly by technological developments, called for detailed analysis and discussion with present, and potential, members of the Australian medical profession. The need to infuse a consideration of ethical issues throughout the entire study and practice of the discipline was called to the attention of medical faculties throughout Australia. That call has only partly been heeded.

This book will add to the Law Reform Commission's message by demonstrating the variety, complexity and controversy of the issues presented to the contemporary healthcare profession. The issues arise out of ancient and abiding problems (such as consent to treatment, confidentiality, respect of patient privacy and high professional standards). They also present new problems (deriving from new techniques of information recording, a clearer understanding of the importance of good communication, the increasing presence of the state in

medical practice, the dilemmas of new drugs and the pressures imposed on doctors working in a society with rapidly changing values).

Soon after the end of my service in the Law Reform Commission, I was appointed to the World Health Organisation Global Commission on AIDS. A decade on, I recently chaired a meeting of UNAIDS in Geneva on AIDS and Human Rights. In the intervening decade, many acute ethical and professional problems were presented by AIDS. Yet the abiding duties of the medical profession remain. Early in the epidemic I learned the importance of basing laws and policies on sound scientific data, not myth and prejudice. That instruction carries a moral for much else that is written in this book. Good ethical decisions tend to be based on sound procedures and a thorough understanding of the facts - not hunch and intuition.

More recently, I have become involved in the Human Genome Project. This is the greatest cooperative scientific endeavour in history. It will provide the encyclopaedia for medical practice in the coming millennium. Both in the Ethics Committee of the Human Genome Organisation and in the International Bioethics Committee of UNESCO, we are considering the enormously difficult ethical challenges which are presented as the DNA of our species is unravelled. Is an individual patient entitled to the privacy of his or her genetic information? Or is a new paradigm required whereby family

members may have rights of access to such data? Should employers and insurers have access to genetic data if the patient wants to live without the burden of discovering unknown genetic disorders? Should it be possible to patent parts of the human genome? Should genetic manipulation of the human germline be permitted? These and other questions demonstrate that, in medical practice, as in so much else, we are hostages to science and technology. The book of ethical dilemmas in medical practice is never closed. It is our fate to live in a generation when the problems are presenting in growing number and complexity. Our capacity to respond is sorely tested.

Yet respond we must. If no other response is forthcoming, our legal system, founded on the common law, requires that the answers to hard questions be given by our courts: in the course of resolving the disputes of individual citizens. This may not be a perfect system. Indeed, it is usually preferable that answers to such complex problems be given by democratically elected parliaments advised by expert and inter-disciplinary bodies which consult widely, such as the Law Reform Commission. Yet in my life as a judge, I have often been presented with dilemmas of the kind discussed in this book. By appeals by medical practitioners against disciplinary decisions where strongly held differences of view are expressed (eg *Walton v McBride* (1995) 36 NSWLR 440, CA). By cases involving a patient's claim, as of legal right, to have access to medical records held by her doctor (*Breen v Williams* (1994) 35 NSWLR 522, CA affirmed (1996) 70 ALJR

)). By claims for damages for the "wrongful birth" of a child or the repeated failure of medical practitioners to diagnose a suspected pregnancy (*CES v Superclinics (Australia) Pty Ltd* 195) 38 NSWLR 47, (CA)). These and many other cases are looked up and discussed in this book. It presents an excellent up-to-date conspectus of contemporary court decisions upon controversial problems of importance to doctors.

One of the advantages of this book is its succinct description of the law and the legal system of Australia. It reflects the interwoven statutory and decisional authority by which our society is governed and under which healthcare workers must operate. The authors know how courtrooms operate. They approach their topics from the viewpoint of an interest in, and understanding of, the discipline of law. Their analysis will afford a firm foundation for the kinds of courses in medical law and ethics that the Law Reform Commission called for nearly twenty years ago. Within that twenty years many new problems have surfaced. They are mentioned in these pages. The topic of this book is one of the most dynamic developments both of ethics and law.

When we reflect on the advent of HIV/AIDS and on the developments of informatics and genomic research in the past twenty years an awkward question is posed: What will be the challenges (at present unforeseen) in the coming decades? Will we have the laws and the ethical principles to resolve them?

The starting point for the answer to these questions understanding of our present institutions and rules where the authors have done a service in writing this not only to the medical profession of Australia.

High Court of Australia
11 November 1996

M