

HEALTH LAW IN AUSTRALIA

FORWORD TO THE SECOND EDITION

The Hon. Michael Kirby AC CMG

HEALTH LAW IN AUSTRALIA

Foreword to the Second Edition

The Hon. Michael Kirby AC, CMG*

Health law has followed me around in various ways for most of my career: as a practising lawyer, a law reformer and a judge. This connection with the field has not slowed since retiring as a judge, most notably through international activities as a Commissioner of the UNAIDS/Lancet Commission on Defeating AIDS and Advancing Global Health and member of the UNDP Global Commission on HIV and the Law.

In the past year or so, I have had cause to reflect on a number of the themes addressed in this book including:

- HIV/AIDS and the law's response to it¹
- privacy²
- adult guardianship, particularly decision-making relating to human sexuality³
- human rights generally.⁴

* Justice of the High Court of Australia (1996-2009); Commissioner of the UNAIDS/Lancet Commission on Defeating AIDS and Advancing Global Health (2013-2014).

¹ <http://www.michaelkirby.com.au/images/stories/speeches/2013/2656%20-%20SPEECH%20-%20UNAIDS%20PROGRAMME%20CO-ORDINATING%20BOARD%20-%20THEMATIC%20SEGMENT%20ON%20NON-DISCRIMINATION%20W.H.O.%20HEADQUARTERS%20GENEVA%2013%20DECEMBER%202012.pdf> and <http://www.michaelkirby.com.au/images/stories/speeches/2013/2658%20-%20SPEECH%20-%20POSITIVE%20VOICE%20PEOPLE%20PLUS%20HIV%20-%20AIDS%20HELATHCARE%20FOUNDATION%20WORKSHOP%20ON%20GREEK%20JUSTICE%20LEGISLATION%20AND%20HIV%20AIDS%20-%20ATHENS%20GREECE%2011%20DECEMBER%202012.pdf>.

² <http://www.michaelkirby.com.au/images/stories/speeches/2013/2653%20-%20ARTICLE%20-%20GRIFFITH%20JOURNAL%20OF%20LAW%20AND%20HUMAN%20DIGNITY.pdf>.

³ <http://www.michaelkirby.com.au/images/stories/speeches/2013/2655%20-%20ARTICLE%20-%20JOURNAL%20OF%20LAW%20AND%20MEDICINE%20-%20ADULT%20GUARDIANSHIP%20-%20LAW%20AUTONOMY%20AND%20SEXUALITY%20-%20OLD%20AND%20NEW%20CHALLENGES.pdf>.

⁴ <http://www.michaelkirby.com.au/images/stories/speeches/2013/2654%20-%20ARTICLE%20-%20NORTHERN%20TERRITORY%20LAW%20JOURNAL%20-%20HUMAN%20RIGHTS%20PROTECTION%20IN%20AUSTRALIA%20-%20SECOND%20AUSTIN%20ASCHE%20LECTURE%202012.pdf> and <http://www.michaelkirby.com.au/images/stories/speeches/2013/2677%20-%20SPEECH%20-%20QUEENS%20UNIVERSITY%20INTERNATIONAL%20STUDY%20CENTRE%20HERSTMONCEUX%20CASTLE%20ENGLAND%20-%20EQUALITY-%20THE%20GREAT%20CHALLENGE%20OF%20HUMAN%20RIGHTS.pdf>.

Even recent work in the UN Human Rights Council's Commission of Inquiry on Human Rights in North Korea confronted my colleagues and me with serious health issues: most especially the impact of chronic food shortages on malnutrition of the population and stunting of newborns.

My ongoing engagement with the field of health law reminds me of its significance for individuals, communities, nations and ultimately humanity as a whole. As noted in Chapter 1 of this book, health law touches all of us.

And this is not surprising. Health law requires us to grapple with challenging questions and moving targets that have wide-reaching consequences for all in our species and beyond. To be human is to need health care throughout life – and especially at its coming in and near its going out. An obvious consequence of the present age, in most countries, is new and changing technologies. Rapid technological advances present complex and difficult questions both for the application of the law and for the identification and resolution of ethical principles that will guide healthcare professionals in their decisions. Decisions about regulation of such technology (or not – recognising that a failure to regulate itself constitutes a policy choice) is a constant companion in health law.

Another issue is potential conflicts. In many circumstances of health care, conflicts can arise between the interests of patients and those of other stakeholders: including family members, governments that fund high cost treatment, insurers, religious groups and other organisations with strong opinions, and members of the healthcare professions themselves. Health law has an important role to play in establishing mechanisms for timely conflict resolution and appropriate criteria for resolving disputes (and ensuring that the criteria are not discriminatory or otherwise arbitrary).

Another key driver in health care today is the international dimension of health law. Localism is slowly fading. The advent of international law and international advisory bodies add a new perspective and new influences to the already complex scene in Australia, with its varying legal provisions: Federal, State and Territory.

I had cause to reflect on the first edition of *Health Law in Australia* when visiting the Queensland University of Technology in 2012 to launch its Health Law Research Centre.⁵ On that occasion I noted, having earlier been asked to speak at the opening of an international conference in Melbourne on issues of adult guardianship. My first port of call, on that occasion, to help me to get my bearings, was that earlier edition of *Health Law in Australia*. It was, and is, an excellent conceptual analysis of a broad range of health law topics, including areas such as guardianship law where there are many disparities between Australia's jurisdictions and many new controversies emerging. It helped me get my bearings, so as to comprehend the broad canvass of law and policy.

In this second edition of the book, I was pleased to see the addition of new chapters, covering the topics of public health, genetic technologies and human rights in health law. A common theme in these chapters (and indeed of others in the book) is the interconnected nature of human existence today – and hence of the law on health care which regulates this most human dimension of the law. Public health regulation looks beyond individual rights to the welfare of society as a whole. And the regulation of genetic technologies reminds us about what is becoming possible and the need for the law to navigate highly sensitive issues where individuals can and do have sometimes competing and sometimes conflicting interests. Still, the field of human rights recognises our common humanity and that healthcare is a subject of universal concern. The commitment to access to the best affordable healthcare is stated both in the *Universal Declaration of Human Rights*⁶ and in the *International Covenant on Economic, Social and Cultural Rights*.⁷ It is a basic right which is only now being elaborated and explored in depth. In part this has occurred because of the challenging reports of the Special Rapporteur on access to health care, also of the UN Human Rights Council.

I commend this second edition of *Health Law in Australia* to readers. Not only have new chapters been added but, as I urged in my foreword to the first edition, authors of each chapter have been invited to consider the wider global perspectives of the

⁵ This Foreword draws in part on some of my presentation at the launch of the Health Law Research Centre.

⁶ Adopted by the UN General Assembly, 10 December 1948; Resolution 217A (III), art 25.

⁷ Adopted by the UN General Assembly, 16 December 1966; 993 UNTS, 14531(entered into force 16 December 1966); art 12 (“The highest attainable standard of physical and mental health”).

health law issues that their chapters raise. This text remains the most comprehensive analysis of health law in Australia with the authors grappling with the complexities presented by sometimes disparate laws in the States and Territories. The chapters are written with clarity and simplicity by leading experts who are well-placed to identify the emerging issues relevant to their fields both nationally and internationally.

I will add one last thought. Those who work in the area of health law and ethics are challenged; but they are fortunate. The dilemmas, paradoxes and controversies that they must describe and help resolve are much more interesting than those faced by many other lawyers, working in well-tilled fields where there may be comparatively little change from generation to generation. In the area of health law, change is a daily companion of scholar, student and health worker alike. This comes about precisely because of the rapidly evolving technology; the changing values of citizens who now expect access to healthcare with heightened knowledge, education and information; and the fresh questions that scholars, families and health care workers themselves are constantly asking. Health law challenges the intellect and but also the sensibilities and consciences of all involved. This book describes this fascinating territory. And it also offers us a glimpse at the future developments that are to come.