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HEALTH LAW IN AUSTRALIA

BY BEN WHITE AND ORS: 3RD EDITION

FOREWORD

The Hon. Michael Kirby AC CMG

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I welcome this 3rd edition of this outstanding text that describes the law in Australia on the issues of healthcare. It analyses the problems that arise on the life journey of Australians faced with critical healthcare decisions.

This is the third set of introductory remarks in less than a decade. Such has been the history of change and development in the applicable law and alterations in the environment in which those changes have taken place. This new edition has been required because of significant amendments to the applicable law, especially as that law is expressed in legislation. However, the environment, including the international environment in which Australian laws have been developing, has also changed markedly.

¹ Justice of the High Court of Australia (1996 – 2009); Commonwealth Eminent Persons Group (2010-11); Commissioner of the UNDP Global Commission on HIV and the Law (2011-12); Chairman of the UN Commission of Inquiry on DPRK (North Korea) (2013-14); and Member of the UN Secretary-General’s High Level Panel on Access to Essential Healthcare (2015-16).

In my remarks for the first and second editions, I emphasised the international environment because, inevitably, it affects our home grown laws. Where, sometimes, there is less impact than there should have been, it is a proper subject for reflection in this book upon why laws and policies developed in the international community have not been followed. Constantly, in Australia, we need today to hold a mirror up to our law and ask whether it conforms with international law and best practice, as recognised by the international community.

Ironically, the foreword to the first edition in 2010 was written at a time when, as I explained, I was on my way to an international meeting, established by the United Nations to explore some of the issues considered in the book. This was a reference to the first meeting of the Global Commission on HIV and the Law established by the United Nations Development Programme (UNDP) to address the impact of law upon the AIDS epidemic, caused by the human immunodeficiency virus (HIV). The report of that commission, with its many recommendations for the change of national laws that impeded the AIDS response, was delivered in July 2012.² In July 2018 I will be travelling to New York once again, this time to participate in a meeting that will review and audit the follow-up to the UNDP report of 2012. In this way, United Nations

² Global Commission on HIV and the Law, *Risks, Rights & Health* (UNDP, July 2012).

agencies are measuring, and assessing, the extent to which their reports and recommendations are affecting the laws and policies of UN member countries. The journey is slow and laborious. Sometimes, there are serious impediments to change and log jams. But municipal law now increasingly operates in the context of international law. Future editions of this book will demonstrate, and illustrate, how this is so.

In addition to the UNDP project, I was appointed in 2015 by the then UN Secretary-General (Ban Ki-moon) to serve on his High Level Panel on Access to Essential Medicines. The report of that panel³ was written in response to the recommendation in chapter 6 of the UNDP Global Commission report. It was also designed to give effect to the *Sustainable Development Goals* (SDGs),⁴ adopted by unanimous vote of the UN General Assembly in 2015. The SDGs express the 17 goals to be pursued by the United Nations by 2030, with “critical importance for humanity and the planet”.

The third of the 17 SDGs is addressed to ensuring “healthy lives and promote wellbeing for all at all ages”. Each of the elaborations of goal three is notable. SDG 3.8 demands the achievement of “universal health coverage, including financial

³ United Nations Secretary-General’s High Level Panel on Access to Medicines, *Promoting Innovation and Access to Health Technologies* (UNSG, September 2016).

⁴ United Nations, *Transforming our World: The 2030 Agenda for Sustainable Development* (A/Res/70/1 (2015)).

risk protection, access to quality essential health care services and access to safe, effective, quality and affordable essential medicines and vaccines for all”.

Because of Australia’s acceptance of SDG 3, it is no longer possible, or appropriate, to view developments of health law in Australia, in isolation from the international commitment accepted for the benefit for all humanity.

Since the last edition of this book significant changes in Australian law have occurred which are described, and added to, the previous editions. Some changes have happened by legislation. Notable amongst these has been changes in the area of euthanasia now more commonly referred to as “assisted dying”. By the *Voluntary Assisted Dying Act 2017* (Vic), the State of Victoria has legalised assistance to competent persons, in specified circumstances and according to particular procedures, to have support in bringing their lives to an end. Such legislation will come into effect in 2019. It is the first such statute in Australia since an earlier effort in the Northern Territory in 1995 having been disallowed by the Federal Parliament. Other States of Australia have considered similar legislation. A proposal for change is now reported to be under review in Queensland.

Also since the earlier editions of this book, there have been many changes in diverse areas of health law. For example, there has been substantial revision of the coverage of adult guardianship legislation because of changes in a number of jurisdictions. New statutes have introduced sweeping alterations to the law of guardianship, introducing fundamental alterations in the approach to decision-making by and for individuals with cognitive impairments. Mental health law has also been the subject of significant new legislation. Many Australian jurisdictions have introduced new statutes, moving generally closer towards recovery oriented and human rights based approaches. Unregistered health providers are being regulated. Australians are witnessing further modernisation of abortion law as the statutes shift from a criminal law approach to one involving regulation, for health law purposes. In countless areas, illustrated in this book, the underlying values of health law are on display. These include the personal autonomy of individuals; beneficence and non-maleficence on the part of health care workers; and the attainment of justice and universal human rights objectives which are never far beneath the surface of health law.

One of the key subjects considered in the report of UNSG's High Level Panel on Access to Medicines concerned the interplay of the provision of rewards and incentives for the

inventors of new therapies and vaccines but in a way that would not prohibit, or unjustly impede, the access to essential health care envisaged by SDG 3.8. In the future we can expect that the actions of politicians, healthcare officials and judges will be measured against the standards of the SDGs. They are designed, in effect, to set the agenda, and to identify the attainable goals of the international community. In future editions of this book I expect that there will be increased references to the SDGs and to international law.

Health Law in Australia will help its readers to navigate the complex and varied issues of health law. The book remains the most comprehensive analysis of the field of health law in Australia. It engages with the complexities of the law in all States, Territories and federal jurisdiction. It does so across the full spectrum of health law. The depth and breadth of the subject matter surveyed is possible only because of the formidable talents of the authors who have contributed chapters, within their areas of special expertise. The book will be of enormous value to legal academics, practitioners and judges.

In United Nations circles it is often said that we must think globally but act locally. In the field of health law, Australian lawyers must increasingly think internationally. From

international law and policy they will increasingly derive inspiration and stimulation for local law. This will help us to move from international principles to local law and to consistent local action informed by international experience.

Michael Kirby

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