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HEALTH LAW IN AUSTRALIA

By Ben White, Fiona McDonald and Lindy Willmott

Foreword
22 June 2010

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As the printers were busily engaged in producing this excellent text, I was on my way to the inaugural preliminary meeting of a new international body that would be exploring some of the issues that are canvassed here.

The body is the Global Commission on HIV and the Law, established by the United Nations Development Programme to address problems that have arisen in the impact of law on the worldwide AIDS epidemic, caused by the human immunodeficiency virus (HIV). The object of the new Commission will be, at once, to help reduce the impediments which domestic law can cause for the international effort to treat people who are living with HIV. And at the same time, to encourage the repeal or amendment of laws that occasion stigma and impede successful prevention of the spread of the virus.

This book, and the new international activity in which I will be engaged, illustrate together a number of important themes that emerge from any contemporary consideration of health law, whether in Australia or virtually any other country:

* Justice of the High Court of Australia (1996-2009); Chairman of the Australian Law Reform Commission (1975-84); member of the International Bioethics Committee of UNESCO (1996-2005); Commissioner of the Global Commission on HIV and the Law of the United Nations Development Programme (2010-).

* In contemporary circumstances, it is virtually impossible to maintain one's own legal system cut off from the global ramifications of health law. Increasingly, the two systems inter-relate and each can learn things from the other;
* Technology plays an ever increasing role in medical responses to disease and impairment. Technology, at once, presents new dilemmas (such as organ and tissue transplantation; in vitro fertilisation; surrogacy; and end-of-life decisions). Failure to respond to technology may affectively amount to a legal decision because, unimpeded, scientists and technologists will proceed with their developments. Technology is substantially universal and so encourages and promotes the globalisation of health law thinking;
* The coalescence of old approaches to health ethics, symbolised by the Hippocratic Oath, with the new developments of global human rights stimulate and encourage the global thinking that is now such a feature of health law in many countries, including Australia; and
* At the same time, complex, pre-existing national and sub-national legal systems remain in place. All too often, as this book reveals, those systems impose divergent legal responses that reflect the acute difficulties of achieving consensus over the provisions of health law. Such consensus is elusive because the ethical dilemmas often have no objectively correct outcome. Reasonable people of much learning and experience can reasonably disagree both about what the law should be and what it is. A vivid illustration of this fact may be found in the majority and minority opinions in the High Court of Australia in the cases concerned with so-called "wrongful birth" and "wrongful life", described in these pages.

This book addresses the detail of health law in Australia. However, it does so against the background of the grand themes of global forces and local disparities. When a particular legal problem presents, especially in a federal country such as Australia, there is no escaping the legal obligation to examine the disparity of the applicable federal, state and territory laws and the sometimes divided opinions of the judges of the higher courts. Yet, in affording the legal answers to particular cases, it is essential that judges, lawyers, health professionals and citizens should keep their eyes of the grand themes: global health dilemmas, global technology, global bioethics and human rights. This is the overall approach that the authors of this book have taken. They are specialists and well respected in the field. The result is a text of great usefulness to law teachers, practitioners and judges. But also, I trust, the health care professionals who find the need to examine the solutions that our often maddeningly chaotic legal system offers to the day-to-day dilemmas of health care practice. If health care is itself often uncertain and imperfect, legal practice is even more so. That is why the achievement of this book is significant. By examining the daunting and complex details of the governing law (much of it now expressed in parliamentary legislation rather than judicial opinions) the authors have rendered a great service for those who will use the book to guide their actions.

I have been engaged in a journey with medical law over my entire professional life. As an articled clerk and young lawyer, I was often engaged in litigation in which doctors and other health care workers were essential witnesses and sometimes litigants. When I served in the Law Reform Commission, it did not take long for us to be obliged to

examine particular projects relevant to health law. The law on *Human Tissue Transplants* (ALRC7, 1977); the law on *Child Welfare* (ALRC18, 1981); the law on *Privacy* (ALRC22, 1983); the law on *Evidence* (ALRC26, 1985). The Commission's reports proved highly influential and many more topics were examined in the years after I returned to the courts. In the New South Wales Court of Appeal and in the High Court of Australia, many were the cases that sought to elucidate the quandaries of law and ethics. Many of those cases are invoked in this book to illustrate general principles and legal doctrines.

As the twentieth century merged into the twenty-first, I was serving on the International Bioethics Committee (IBC) of UNESCO. Its activities coincided with the successful completion of the human genome project. That project and other advances in biotechnology presented new and complex controversies for resolution by municipal law. The IBC was given the task of preparing a new *Universal Declaration on Bioethics and Human Rights*. I had the privilege of chairing the group that drafted that document. Eventually, in 2005, it was unanimously endorsed and adopted by the General Conference of UNESCO. It constitutes the first endeavour of humanity to bring together in the one document the strands of health care ethics and human rights that had hitherto evolved over centuries, respectively in the hands of the doctors and lawyers. The complexities of this challenge, together with the controversies presented by the global epidemic of HIV/AIDS, taught me to view the developments of local law and policy from the perspective of global principles, applicable to the whole human family.

The commonalities of human life, of the illnesses to which we are heir and the dilemmas that we must resolve are such that, in health law, we

can learn today for the experience of other lands. Including those whose legal system and cultures are different from our own. Necessarily, some of the issues of principle that are addressed in this book are considered in the UNESCO declaration and other international instruments. The general principles that govern the provision of medical care; the special rules that apply in the case of children and people with disabilities; the need for remedies in the case of negligent action and omission; the puzzles of stimulating human life and sometimes terminating it are not confined to the law of Australia or even that of common law systems. These are universal problems and the technology that is now applicable enhances the global characteristic of this field of law: especially when we come to consider the global market in organ and tissue donation, in health and medical research, and in the regulation of bio and nanotechnology – topics dealt with in the closing chapters.

Meantime, lawyers and law makers stumble on, solving their immediate problems, but often (as this book shows) with high local particularity and diversity, even in a country with so many commonalities as Australia. There is no international agency that has the undisputed role of assisting the development of health law from a global perspective. The World Health Organisation takes responsibilities for epidemics. UNAIDS addresses the particular issues of HIV. The Global Fund concerns itself with AIDS, tuberculosis and malaria. UNESCO tackles bioethical problems. The Commonwealth Secretariat encourages dialogue amongst the English-speaking professionals. The OECD promotes interaction where health law has an economic edge. But no agency of the United Nations, or of the world community, examines this field of law freshly in the light of the commonalities of human existence; medical technology; and universal human rights.

Reflecting on the detail of health law within the Australian Commonwealth, we can see in microcosm the common elements and differences that exist in the wider world. A book like this should therefore encourage us to reflect upon the ways in which we can share our experience with, and learn from, other lands, at least in this area of legal discourse.

I congratulate the authors both because of the precision of their writing and because they have not lost sight of the large themes that run through any examination of health law. I applaud the clear layout and presentation of the text with the Key Issues that precede each chapter and the puzzling “Points for Consideration” that appear at each chapter’s end. I admire the intricate attention to the disparities of applicable Australian legislation. And, for the future, I encourage these writers of great talent to reflect upon the direction in which health law is travelling in our world. And how we can facilitate the sharing of experience given the fact that the quest for human health is truly one of the great bonds that unites our species in the common goal of “the enjoyment of the highest attainable standard of physical and mental health”. (ICESCR, Art.12.1).

MICHAEL KIRBY

Sydney
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