

The bottom line is that bed numbers ought not to be reduced unless and until it is certain that there is proper provision for continuing adequately funded community facilities.

But the *Herald* reports that this changeover from hospital to community care is a grey area despite the assurances of Mr Wootton.

Another grey area is the Community response to greater numbers of mentally disturbed persons outside the institutions. One response already mentioned is the possibility that a larger number will end up in prison or roaming the streets. Another response (which occurred in Italy) is that private nursing homes are likely to greatly increase in number. As Dr Maurice Sainsbury, Director of Mental Health Services in NSW said the success of the new legislation depends on it being 'an act of faith'.

aids — the law's response — part I

They answered, as they took their fees, 'There is no cure for this disease'.

Hilaire Belloc
Cautionary Tales for Children,
'Henry King'

criminal sanctions. One legal response to the appearance of AIDS in our community has been the recently proposed introduction of legislation in NSW prescribing notification procedures to a public authority and proscribing the wilful transmission of AIDS, backed up by criminal sanctions for non-compliance:

AIDS will become a reportable disease and it will become an offence to knowingly transmit AIDS under laws to be introduced in the spring session of [the NSW] parliament... Doctors will have to notify the State health department of patients suffering from AIDS and those with AIDS antibodies (*The Australian*, 21 August 1985).

duty to protect public health. According to a media release of the Deputy Premier and Minister for Health (27/8/85) the intention of such laws is to protect the public health, in particular, to curb the spread of AIDS. However, it has been suggested by the National

Advisory Committee on AIDS that legislation may be counterproductive to such purpose:

In a Report from the National Advisory Committee on AIDS to the Commonwealth Minister for Health, the Committee asked the Minister:

[T]hat [h]e note this Committee's grave concerns that the use of legislation in response to AIDS may be counterproductive and its belief that concerted and co-ordinated information and education campaigns are likely to be more effective in controlling the transmission of the AIDS virus' (December 1984).

A similar view was expressed at a National Symposium on AIDS in June of this year. The Director of the Criminal Law Review Division and the Assistant Secretary of the Department of Attorney-General NSW, Messrs Howie and Webb respectively, delivered a joint paper the basic submission of which was that:

[W]ith the current lack of knowledge of the [AIDS] virus, the criminal law should not be called upon to respond to this threat to the public health at this time. Other alternatives must be found to prevent or reduce the spread of the disease rather than the threat or use of criminal sanctions. Public education is one such alternative ...

Howie and Webb correctly point to normative principles that found the valid creation of criminal offences namely, the offence/s must be enforceable and people must be able and willing to comply with the statutory directives. Their paper is reprinted in *The Australian Journal of Forensic Sciences*.

the Venereal Diseases Act 1918 (NSW). The VD Act has been used as an analogy for the proposed legislation in terms which belie the truth of the analogue:

The Venereal Diseases Act is almost certain to be amended to deal with the spread of AIDS and other sexually transmitted diseases (*Sydney Morning Herald*, 15 August 1985).

Under the VD Act medical practitioners are *inter alia* required (under penalty of criminal sanctions for breach) to notify the NSW Health Department of the names and addresses of persons diagnosed with syphilis. In practice, practitioners do not do so. The Director of the STD clinic advised that the clinic has an express policy of not disclosing patients' names and addresses to the Health Department. Code numbers only are provided. The Director explained that the fundamental reason for this policy is that 'contact tracing' – necessary for the control of the spread of venereal disease – is conducted by the STD clinic, and any actual or apparent breach of patients' and potential patients' confidentiality would jeopardize the current voluntary presentation for treatment by persons who suspect they have a venereal disease. Disclosure of patients' names to the Health Department, or any other third party, would therefore ultimately put public health at risk. In the 57 years of its operation there does not appear to have been any case of a patient or a practitioner being charged under the Venereal Diseases Act. The proposed AIDS legislation is arguably at odds with its own purpose, namely the protection of public health.

The enforcement of such purpose is almost entirely dependent on the antecedent co-operation of persons in AIDS risk categories. It is not surprising therefore that doctors at the Albion Street AIDS clinic, and most members of the Venereology Society of NSW have said that they will not comply with the proposed laws:

Their stand follows reports of a dramatic fall in patients seeking treatment for AIDS and sexually transmitted diseases since Cabinet announced last week it would require doctors to report patients who have antibodies which may indicate the disease (*Sydney Morning Herald*, 30 August 85).

Public Health Act 1902 (NSW). In August 1984 AIDS was proclaimed an 'infectious' disease under the Public Health Act 1902 (NSW). Section 28 of the Act empowers the

Governor to make regulations for the 'purpose of preventing or checking' the spread of disease to which end 'contacts' and 'carriers' may be defined by regulation and persons falling within such description can be 'segregated' from the populace. In fact no regulations have been made to date. According to Howie and Webb:

The reason that regulations have not been made is clearly a difficulty of defining the conduct, person or places which are to be regulated or controlled... At this time [June 1985] it would seem that the only means of defining 'contacts' or 'carriers' of AIDS is largely by way of a person's sexual preferences. How such a person is identified in order to be 'segregated' is not presently apparent'.

current medical knowledge. The current state of medical knowledge is such that it is not possible definitively to identify people capable of transmitting the AIDS virus to others. Doctors can test for the existence of AIDS antibodies, but this indicates only that the person has had contact with the virus at some point earlier in time. Whether the virus persists (and can therefore be transmitted) in these cases has not been clearly delineated but early evidence of medical research suggests that persistence is a likely problem. However, even assuming the persistence of the virus in those who are antibody positive nevertheless the rate of transmission through sexual contact is far from clear. Further medical knowledge in relation to the transmission of AIDS is heavily dependant on further medical research. Hence the importance from the public health view of encouraging people to find out their antibody status. The creation of criminal offences is thought by its opponents to be unlikely to achieve this desired end. And in any event, the present inability of medical science to identify AIDS carriers presents insurmountable problems of proof of the material element of causation in both criminal and civil law. By implication, in the words of Howie and Webb:

Where the knowledge of the causation, transmission or treatment of a disease is uncertain then the measures which must be taken to deal

with it will be wide-ranging, complex and uncertain. If those measures are to be given criminal sanctions to enforce them, then necessarily such offences must be wide, uncertain and complex.

In the present context, given that the largest number of citizens likely to be affected by the proposed laws are those in whom AIDS antibodies have been detected but who have no clinical symptoms of AIDS or of 'AIDS related disease', and given that at present this fact does not allow positive identification of such a person as a 'carrier', serious issues arise. How can such persons comply with a directive not to transmit AIDS? And why should such persons be required to submit their personal particulars to a public health authority? These questions raise the related matters of discrimination and infringement of civil liberties — subjects that will be canvassed in relation to AIDS in a future issue of *Reform*.

The picket in the scrub

Stir the wallaby stew
Make soup of the kangaroo tail
I tell you things is pretty tough
Since Dad got put in jail

Trad

the industrial background. In 1980, the Australasian Meat Industry Employees' Union (AMIEU) applied to the Arbitration Commission for a new award to cover all meat industry employees in the Northern Territory. Until then, some abattoirs in the Territory had worked under a tally system; others had worked under privately negotiated contracts. The AMIEU hoped that the Commission would outlaw the contract system and bring down an award based on the tally system. Under the tally system, when the minimum tally is reached, usually in about four hours, workers go onto penalty rates which are increased as the day progresses. In September 1984, the Full Bench of the Arbitration Commission decided that:

- No case had been made out for an extension of the tally system to abattoirs where it was not already operating.

- It was not satisfied that the present contract system gave employees proper award coverage, and would permit a contract system only insofar as payment for actual work done was concerned.
- It was not prepared to allow an award provision for a contract system which overrode all other provisions of the award.

On the basis of this decision, on 29 April 1985, Commissioner McKenzie brought down the award which is the subject of the current dispute.

the award. Applying to establishments in the Northern Territory engaged in the processing of meat for human consumption, the Northern Territory Meat Processing Award, 1984 sets minimum wage rates for the various classifications of abattoir employee for a forty hour week. In addition, it makes provision for the payment of overtime, four weeks annual leave, sick leave, and the issue of protective clothing. It also provides for payment by results. Clause 33 of the award says that an employer may remunerate employees under a system of payment by results provided that such a system shall enable a weekly employee to receive no less for the work performed than the remuneration he or she would be entitled to receive under the award, plus twenty per cent. And, most controversially, the terms of any system of payment by results shall be negotiated and agreed upon by 'the employer and the majority of employees concerned, or their nominated representatives'. A contract system was thus enshrined in the award which was to operate for a period of twelve months from 2 May, 1985.

Mudginberri. At Mudginberri, an abattoir and meat processing works, about 230 kilometres east of Darwin, the employer entered into negotiation with representatives of the employees in accordance with Clause 33. Mudginberri had previously operated under the contract system and had been picketted