

cated the proposed guidelines would set down what was expected of doctors.

He said guidelines were preferable to imposing regulations, which would be far more rigid. He said courts already took into account what was normal medical practice (*The Age* 30 January 1990).

Professor Ron Penny, Chief Commonwealth Education and Services Advisor on AIDS for the Australian National Council of AIDS, believes that it is essential that patients be informed about what is happening to them. Despite the amount of information available to the community about AIDS, Professor Penny believes that it is still the doctors responsibility to ensure patients understand the ramifications of the disease. He said

often patients need the information repeated because they don't retain that information because of the stress at the time and go away with the impression that the doctor never told them (*Sydney Morning Herald* 21 November 1989).

The President of the New South Wales Branch of the Australian Medical Association, Dr Bruce Shepherd, was not on the proposal to amend legislation to make it clear that professional misconduct includes a failure to provide adequate information to a patient. He said such legislation will frighten doctors and convince many young people not to take a medical career.

You are going to get nowhere by threatening doctors with deregistration. All we can do is keep trying to educate young doctors by teaching them how to communicate with patients (*Sydney Morning Herald* 20 November 1989).

The Chairman of the Queensland Branch of the Australian Medical Association, Dr Warwick Carter, said that a legislative move to ensure patients were given adequate information about their illnesses was 'using a sledgehammer to deal with something which could be solved more subtly'. If the plan was adopted, patients could more easily sue 'secretive' doctors for negligence (Queensland Sun 20 November 1989).

The President of the Doctor's Reform Society of New South Wales, DrCon Costa, said:

No doctor who is practising with high standards would have anything to fear from such legislation. It's a matter of professionalism to give full explanations about medicine, treatment and conditions. The patient has a right to know . . . I always make a point of letting my patients know that they can have a copy of their records. It's part of the service they pay for. If doctors won't show patients their records, perhaps they should charge less (*Sydney Morning Herald*, 21 November 1989, page 13).

According to the Victorian Health Issues Centre, consumer groups believe these proposals do not go far enough in protecting patients.

Statutory reform was needed through an Act of the Victorian Parliament, rather than just guidelines. Even if the guidelines could be used in negligence actions. She [Jaleen Caples] said there were significant barriers to people taking court action because it was costly and it was often difficult to get one doctor to testify against another. It was disappointing that the Commissions had not proposed an alternative compensation scheme, such as the medical no-fault misadventure scheme which was in place in Sweden and being considered in Britain (*The Age* 30 January 1990, page 11).

The report and a separate volume containing the doctor and patient studies are obtainable from the ALRC and from Information, Victoria, 318 Little Bourke Street, Melbourne.

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courts consider informed consent

Show him death, and he'll be content with fever.

Persian proverb

Meanwhile, judge-made law on the question continues to develop. In two recent unreported cases NSW courts have considered the nature of the consent which a person must give before medical treatment can lawfully be administered. Both cases (*Ellis v Wallsend District Hospital* (Court of Appeal, 19 October 1989): and *H v Royal Alexandra Hospital for Children* (Badgery-Parker J, 4 January 1990)) considered other important issues, but the nature of consent was central to both.

subjective test. In *Ellis* the three members of the Court of Appeal (Kirby P, Samuels and Meagher JJA) agreed that the test of whether the patient had consented to an operation was subjective, that is, what the particular patient would have done in the light of full information, rather than an objective test framed in terms of what a hypothetical 'reasonable person' would have done. The plaintiff, Ms Ellis, who had a long medical history, complained to her doctor of pain. The doctor suggested a particular operation, but did not, so the court found, disclose the risk that the operation had low probability of relieving the pain and a significant risk of resulting in extensive and permanent paralysis. In fact, the plaintiff became a quadriplegic, allegedly as a result of the operation, and brought an action in negligence for damages against the hospital in which the operation was performed. She gave evidence that if she had been told of the possibility of the consequences she would not have consented to the operation. She was not cross-examined on this evidence. Though the appeal was dismissed for reasons connected with the vicarious liability of hospitals for the negligence of honorary medical consultants, on the test of consent and the warning which providers of medical services are obliged to give patients, the judges agreed. In these circumstances there was an obligation to warn the patient of the risk of paralysis. The next question was whether, if after being fully informed of that risk, the patient would still have consented to the treatment. This question was to be answered on the basis of what the particular pa-

tient would have done. In the event, evidence given by the patient was not conclusive. Other evidence, for example evidence that the patient had previously declined to have medical treatment after considering risks inherent in that treatment, was admissible and relevant.

principle applied. In *H v Royal Alexandra Hospital for Children* the plaintiff, a haemophiliac, claimed damages from the hospital because he had contracted AIDS allegedly as a result of treatment with anti-haemophilia factor (AHF), a blood product administered in the hospital. He alleged that the hospital was negligent in failing to warn his parents (he was 7 or 8 years old at the time) of the possibility of infection from diseases transmitted in blood products. The decision turned upon whether the plaintiff was infected in March 1982 or in September 1983. He had received treatment with AHF at both these times. Judge Badgery-Parker found that at the earlier time the state of knowledge about blood-borne diseases was such that it was not reasonable for the hospital to have warned patients who were to be treated with AHF of the risk of infection from AIDS: it had discharged its obligations in this respect. At the later date, however, knowledge of the possibility of AIDS being transmitted in blood, though not established definitely, was regarded by the scientific community as a distinct possibility. Therefore a specific warning was required. The evidence disclosed that no such warning had been given. The plaintiff's parents gave evidence that if they had been warned they would not have consented to treatment of their son with AHF. However, applying what had been said by members of the Court of Appeal, particularly Samuels JA in *Ellis*, Judge Badgery-Parker did not take this statement as conclusive and looked at other circumstances, particularly the alternative treatment available to haemophiliacs, the long and close relationship between the parents, the hospital staff who treated the plaintiff, and other relevant factors. He concluded that there would have been a breach of duty, but that he could not

find that it was causally related to the plaintiff's condition. In the event Judge Badgery-Parker concluded on the balance of probabilities that the plaintiff was infected in March 1982, so that there had been no breach of duty on the part of the hospital.

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child rights

Bringing the world's children up to the minimum right to survive is a gargantuan task.

Canberra Times 2 February 1990, p23

Australia is likely to be a signatory State to the United Nations Convention on the Rights of the Child which was opened for adoption in January 1990 (*Canberra Times* 25 January 1990). The Convention has been described as 'an astonishingly diverse document that has bridged the world's cultural, political and economic divides' (*Canberra Times* 2 February 1991). It was first proposed by Poland in the International Year of the Child (1979) and was ten years in preparation.

Are children's rights adequately protected in Australia? The Minister for Justice, Senator Michael Tate is already on record as saying that it would be a charade for Australia to sign an international convention on the rights of children while the child mortality rate among Aborigines was so high (*Australian Financial Review* 8 September 1987).

There can be no question that, throughout the world, children's rights need protecting. Estimates of the number of children throughout the world who are homeless and abandoned vary between 80 and 100 million. More than 38 000 children die daily from lack of food, shelter or primary health care (Foster Parents Plan International) and there are more than 10 million child refugees throughout the world (*Sydney Morning Herald* 4 November 1989).

what rights does the convention recognise?
The Convention provides a principle by which children's rights can be identified — the principle of best interests. It says the best interests of children is to be the basic concern of parents and the principle followed by governments. The Convention recognizes the following rights for children:

- an adequate standard of living
- a name and a nationality
- to know and be cared for by their parents
- not to be separated from their parents against their will
- to be educated
- freedom of expression
- to express their own views freely
- to be heard in any judicial or administrative procedure
- basic civil liberties
- freedom from oppression and discrimination
- to enjoy their own culture
- protection from interference with privacy
- special assistance during international conflict and disaster
- prevention from abduction, sale or traffic
- protection from drug abuse, sexual exploitation and sexual abuse.

The Convention also covers parental rights and responsibilities. It proposes:

- the right to possess children
- the responsibility for their upbringing and development
- the responsibility to educate children and to support them.

The Convention declares that both parents have joint responsibility for their children.