OPINION

Joint issue

We are very excited about this joint venture between *Health Issues Journal* and the *Alternative Law Journal.* The Health Issues editorial committee has collaborated with Beth Wilson, Victoria's Health Services Commissioner, as editor for the Alt.LJ. We hope that the range of issues covered in this one small journal gives some indication of the extensive interaction between the law and health.

One of the key themes to come through in many of the articles is the increasing demand by the community for a more transparent and accountable health system. Women for example, are no longer content to be excluded from clinical trials of new pharmaceuticals or to live with the consequences of this exclusion for their treatment. The ethics of extracting dead men's sperm for use by their widows is questioned by many. The Coroner's office is examining who is responsible for monitoring deaths occurring in hospitals. The detention of individuals with infectious diseases and the provision of services to the inmates of privatised prisons, and to people who for one reason or another require supported accommodation, are also subject to increasing scrutiny.

The trend to greater accountability of the health system is promoted by legal activism as well as changed attitudes within the health sector and the broader community. It also has important spill over effects on the practice of the law itself, as the article on the development of a code of practice to guide the conduct of medical negligence reveals.

It is of course, not the law alone which is generating this increasing emphasis on accountability. Nor does it stop at systemic issues. It also extends to the level of the relationships between individual practitioners and health consumers. In this issue two articles explore what is required for the law to catch up with the growing desire for increased transparency and consumer participation in the management of personal health information. Consumers are demanding legal rights of access to their records and health laws that protect not only the confidentiality of records, but also the broader notion of consumer control of their privacy. These demands are becoming especially urgent in an electronic environment.

Health practitioners themselves are keen to see changes which will have a profound impact on the nature of their relationships with health consumers. Thus for example, National Health and Medical Research Council (NHMRC) clinical guidelines in *The Management of Early Breast Cancer* state that it is essential to encourage women to participate in the selection of surgical and subsequent treatment even though this may involve considerable time in discussion with therapists.[1]

Informed consent and the Bristol case

Legal activism will however continue to play a major role in ensuring that these trends continue to evolve towards both a more accountable health system and more participative health care relationships. The emphasis on informed consent in the High Court case of *Rogers v Whitaker* (1992) 175 CLR 479 was a landmark in this regard.

In *Chappel v Hart* (1998) 156 ALR 517 the High Court again confirmed that a health practitioner's technical skills are not enough. They must also have good communication skills and ensure *informed* consent. In this case a woman considering throat surgery specifically asked about the prospects that she might end up sounding 'like Neville Wran'. Her surgeon failed to warn her that this was an unlikely but possible result. Unfortunately this was in fact the outcome of the surgery.

The High Court's finding for the plaintiff in this case reinforced the reality that informed consent requires practitioners to listen to and respond to the concerns of their patients. As Justice Kirby pointed out in *Chappel v Hart,* if practitioners choose not to adhere to the standard set by the law it should be no surprise if legal consequences ensue. This may sometimes seem a tall order, but there are good reasons for such standards.

The need for greater openness within the health system and in individual health care relationships, has been demonstrated dramatically by a recent scandal in the United Kingdom. A *Medical Journal of Australia (MJA)* editorial[2] describes this case as 'shattering the public trust in the medical profession'. It resulted in a General Medical Council (GMC) Inquiry into 53 operations at the Bristol Royal Infirmary in which 29 children died and four were left with brain damage following surgery by two paediatric cardiologists. Formal action by the GMC only resulted after a consultant anaesthetist went over the head of the Chief Executive of the hospital and 'blew the whistle'.

This brave action was not without its consequences for the whistleblower, who ultimately relocated to Australia in order to continue practising.[3] The *MJA* warns that without an ongoing tangible commitment to quality in health care and an open and non-punitive professional culture the Bristol case could certainly be replicated in Australia. The factors that discourage openness and frankness about a practitioner's personal performance were identified as a key preventive measure. Australia needs to act on this.

We look forward to working together, lawyers, health practitioners, consumers, all, to ensure that Australia does not see a repeat of the Bristol case and that the trend to greater emphasis on partnerships, openness and accountability continues.

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References

1. NHMRC (1995) p.33.
2. Martin Van der Weydon, 'The Bristol Case, The Medical Profession and Trust', (1998) 169(7) *MJA* 352.
3. Lennane, K. Jean and De Maria, William, 'The Downside of Whistleblowing', (1998) 169(7) *MJA* 351.