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EDITORIAL – *Guest Editor: Belinda Bennett*

Law, Global Health, and Sustainable Development: The Lancet Commission on the Legal Determinants of Health

In 2019 the Lancet Commission on the Legal Determinants of Health set out the important role that law can play in supporting global health. The Report sets out four legal determinants of health which address the role of law in supporting sustainable development; law's role in strengthening national and international governance; the importance of evidence-based public health laws; and the importance of building legal capacities for health. This Editorial provides an overview of the Report and its recommendations. 505

LEGAL ISSUES – *Editor: Joanna Manning*

Changing to Deemed Consent for Deceased Organ Donation in the United Kingdom: Should Australia and New Zealand Follow?

During 2020 new legislation in England and Scotland will come into force, which adopts a Welsh reform implemented in 2015, changing the law on deceased organ donation from an “opt-in” regime, based on the explicit consent of the deceased donor during their lifetime or that of their family, to a model of soft, “opt-out,” whereby the deceased's consent to donate will be “deemed” unless they have registered or made known an objection during their lifetime. This column examines the ethical case for both regimes and analyses the law reform and its implications. A key issue is whether the controversial practice in soft opt-in systems of the family override, even where the deceased had opted in, will continue under the new regime. The sole aim of the law reform is to increase the supply of organs from deceased donors for transplantation to meet ever-increasing demand. Notwithstanding that taskforces in Australia and New Zealand have recently rejected introducing opt-out systems and New Zealand has not yet even introduced a dedicated organ donation register, evidence of increased donation rates following the UK reform may revive an issue which is currently off the reform agenda in this part of the world. 513

MEDICAL ISSUES – *Editor: Mike O'Connor*

Surgical Experimentation by John Marion Sims in the Pre-Anaesthetic Era

The reputation of the pioneering gynaecologist J Marion Sims has been brought into question by a scandal over experimental surgery on African American slave women. Sims attempted to find a surgical cure for vesico-vaginal fistulae – an obstetric injury resulting from bladder damage after obstructed labour. His statue was removed from Central Park, New York, in 2018 in deference to the public outcry regarding his racist behaviour. A debate has raged over failures of consent for up to 30 procedures on a single patient which were performed without anaesthesia on vulnerable young slave women. However, this may be an example of “presentism” whereby the “beliefs, attitudes and practices of the 21st century are anachronistically projected retrograde to the early 19th century”. This column argues that there are two separate issues: namely, the proposition that slaves could not freely give consent and that the surgery was deliberately tantamount to torture. In the

1850s United States slaves had no civil rights and no adequate anaesthesia was available during the period of surgical experimentation between 1841 and 1845. 527

BIOETHICAL ISSUES – *Editor: Julian Savulescu*

The Voluntary Assisted Dying Law in Victoria – A Good First Step but Many Problems Remain – *Hugh Platt*

In 2019, the *Voluntary Assisted Dying Act 2017* (Vic) came into force. Thereupon, Victoria became the first State in Australia to enact such a law since the Commonwealth of Australia overturned Northern Territory legislation in 1997. Because of the difficulties in the introduction of Victorian law, it is extremely conservative, with many safeguards. There are significant limitations to this law which will result in significant ethical difficulties for medical practitioners and their patients. Four problematic areas of the law are discussed: the prohibition on health practitioners introducing the subject, introduction of the subject of voluntary assisted dying to patients; difficulties in obtaining access to treatment in certain populations in Victoria; the arbitrary minimum age of 18 to be able to access voluntary assisted dying; and the difficulties for patients and practitioners in evaluating the capacity of patients with mental illness and cognitive difficulties. Practical solutions to these difficulties will be proffered and discussed. 535

COMPLEMENTARY HEALTH ISSUES – *Editor: Ian Freckelton QC*

Prohibition Orders and the Regulation of Unregistered Health Practitioners

Regulation of unregistered and deregistered health practitioners has been a policy objective of Australian governments for a number of years. A regulation scheme based upon New South Wales (NSW) and New Zealand models, and using broad-based, mandated codes of conduct, has gained momentum over the past decade. Prohibition orders are an integral part of the scheme. The removal from practice of the alternative health care practitioner, Barbara O'Neill, by the New South Wales Health Care Complaints Commission (HCCC) represents a high-profile assertion of the authority of evidence-based health care. It shows that Australia's "negative licensing scheme" has teeth and that it is working successfully to exclude dangerous provision of health services by unregistered practitioners. This column makes reference to the evolution of the regulation of unregistered practitioners in Australia and scrutinises the conduct of Barbara O'Neill that led to the HCCC's imposition of a prohibition order to protect vulnerable members of the public. 551

TECHNOLOGY AND HEALTH LAW – *Editor: Bernadette Richards*

Health Care, Technology and Innovation: What's Law Got to Do with It?

Health care is consistently evolving and improving. We have moved from a time when health care was a true mystery and many conditions were deemed untreatable to one where the general population rejects any idea that health care is likely to harm or do anything other than cure illness. Central to this evolution has been the introduction of technology into health care. While this undeniably represents a much-desired inclusion in medical treatment, it poses specific regulatory challenges. Each of these challenges warrants specific and detailed analysis and critique. This column explores the intersection between the law, technology and health care and provides insight into how these can (and do) interact. It is an introductory discussion that serves to raise questions for further consideration. 561

Preventing Harm to Others as a Criterion for Compulsory Treatment: An Overview of Criticisms and Current Research

Mental health legislation, which enables compulsory detention and treatment of those with severe mental health conditions, usually contains criteria that include the need to prevent harm to self or others. This column provides an overview of criticisms of the harm to others criterion and recent research investigating the association between violence and severe mental health conditions. It argues that despite several criticisms and research indicating only a modest association between violence and certain mental health conditions, there is little momentum for omitting this criterion. 570

HEALTH LAW REPORTER – Editor: Cameron Stewart

Unconventional Practice, “Innovative” Interventions and the National Law – Cameron Stewart, Ian Kerridge, Catherine Waldby, Wendy Lipworth, Megan Munsie, Tamra Lysaght, Christopher Rudge, Narcyz Ghinea, Lisa Eckstein, Jane Neilsen, Jenny Kaldor and Dianne Nicol

This column explores a recent health profession disciplinary case which throws light on the problems of unconventional interventions by medical practitioners under the *Health Practitioner Regulation National Law Act 2009* (Qld). The case involved “innovative” practices which were later found to have been scientifically unsupported, dangerous to patients and grounds for cancelling the health practitioner’s registration. This column looks at common features of these kinds of cases in Australia and then examines recent attempts by the Medical Board of Australia to draft policy guidance around the use of unconventional practice in medicine. This column concludes with a number of changes to improve the effectiveness of the proposed policy. 574

ARTICLES

COVID-19, Negligence and Occupational Health and Safety: Ethical and Legal Issues for Hospitals and Health Centres – Ian Freckelton QC

The international incidence of health workers being infected with COVID-19 is deeply troubling. Until a vaccine is developed, they are the community’s bulwark against the pandemic. It is vital that they be protected to the maximum extent possible. This entails the need for implementation of effective and compassionate protocols to keep their workplace as safe as possible for them, their colleagues and their patients in a context of much as yet not being known about the virus and awareness that some persons infected by it are for a time at least asymptomatic and that others test negative for it when they are prodromal or even already displaying some symptomatology. This has repercussions both for the liability of hospitals and multi-practitioner centres for negligence and also under occupational health and safety legislation. With the commencement of the roll out of biosecurity and disaster/emergency measures by government and escalating levels of anxiety in the general population, it is important to reflect upon the measures that most effectively can be adopted practically and ethically to protect the health and safety of those whose task it is to care for us if we become infected by COVID-19. 590

The Lake Alice Hospital Child and Adolescent Unit: Accountability – The Response to Date – Rosemary L Thomson

In the 1970s Dr Selwyn Leeks, a registered psychiatrist set up a child and adolescent unit in the grounds of Lake Alice Hospital, a New Zealand psychiatric facility. The adolescents were not diagnosed as having mental disorders but were placed there for behavioural

issues. They were controlled by “aversion therapy” and subjected to electroconvulsive therapy treatment, paraldehyde injections and other forms of abuse. A number of complaints followed, which led to Government inquiries and reports. In 1999 a class action was commenced which was settled by the Government making “ex gratia” payments and issuing apologies. Dr Leeks relocated to Australia and continued to practise. He was the subject of complaints and proceedings. In 2006 he surrendered his practising certificate. The New Zealand Police have declined to prosecute Dr Leeks. A complaint was taken to the United Nations Committee Against Torture. This was upheld in 2019. 601

Vaginal Dialogues: The Trials and Tribulations of Mesh in the Repair of Prolapse –
Mike O’Connor and Bill Madden

Media reports suggest that between 2005 and 2014 an estimated 8,500 patients were injured (including 170 deaths) in Australia by defective medical devices. An Australian representative action against two manufacturers and a supplier of certain medical devices used for the treatment of stress urinary incontinence and pelvic organ prolapse by three women representing over 700 registered class members alleging serious complications of vaginal mesh repair gave rise to a judgment in favour of the plaintiffs in late 2019. The judgment suggests that replacing a set of suspensory components of the levator ani muscle with a rigid matrix of mesh which provided strong support at the expense of flexibility may have been a misguided choice. 618

Consideration of a Legislative Framework to Support the Diagnostic Odyssey Commonly Encountered in the Instance of Rare Disease –
Marisa Taliangis and Gareth Baynam

The diagnostic odyssey refers to the struggle to achieve a diagnosis for a medical condition in the face of significant implications if a diagnosis is not made. It is a common experience for people living with a rare disease. Western Australia has led the way in Australia in being the first State to establish a rare disease policy framework and an Undiagnosed Diseases Program (UDP). The UDP includes an expert panel made up of various specialists brought together with the aim of arriving at a diagnosis through collaboration. This article looks at the possibility of enhancing initiatives such as the UDP through a legislative framework. Relieving the medical, financial and emotional implications of the diagnostic odyssey is particularly important when one considers that taken together, rare diseases affect millions of people globally. 634

Children of the Dead: Posthumous Conception, Critical Interests and Consent –
Neil Maddox

Artificial Reproductive Technology now enables the conception of children after the death of their genetic father. There is little consensus on how posthumous conception should be dealt with by the law and this article examines alternative approaches to such regulation. The goal of any such regulatory regime should be the vindication of the deceased’s critical or objective interests after death. Alternative approaches risk instrumentalising the dead to serve the interests of the living, or weigh too heavily the deceased’s past decisional autonomy at the cost of respecting his or her likely wishes after death. Separate requirements should apply to applications for posthumous sperm retrieval and its subsequent use, with the former being less onerous given the emergency nature of the procedure and the latter involving a tribunal whose function is to consider how best to give effect to the deceased’s reproductive autonomy after death. 645

Medical Practitioners Who Deny Young Women Sterilisation Surgery “Because They Will Regret It Later”: Patient-centred Practice or Discrimination? – Joshua Taylor

Women in Australia routinely access medical services which, by design or consequence, sterilise them. There is evidence which suggests that some medical practitioners are not offering procedures to young women where the surgery will make them infertile. These decisions are often defended on the basis that women who lose their fertility will go on to regret the medical procedure in the future. This article will consider the legal and ethical implications of this practice. It will first critically analyse the ethics of this decision according to the Beauchamp and Childress principles of justice, applying them through the lens of a patient-centred practice framework. It will then examine whether such practice may constitute discrimination under the Federal and Victorian discrimination frameworks, focusing on whether such decisions constitute age discrimination, gender discrimination, or discrimination on the basis of parental status. This article will draw the conclusion that such decisions are generally unethical and may constitute discrimination under Australian laws.

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Breaches of New Zealand’s Health and Disability Services Consumers’ Rights: Human Rights Review Tribunal Decisions – Kate Diesfeld, Lois Surgenor and Marta Rychert

This article illuminates New Zealand’s legal response to breaches of rights within the health and disability services context. Alleged breaches of the Code of Health and Disability Services Consumers’ Rights may be heard by the Human Rights Review Tribunal. The article describes this body’s composition and powers, as well as patterns within the 44 relevant decisions published between 1 January 2002 and 30 June 2019. New Zealand’s unique medico-legal system created a distinctive legal response to breaches of the rights of “consumers”. The Tribunal decisions in this article relate to breaches of consumers’ rights by both registered and unregistered providers. The research contributes to international scholarship regarding how justice is administered when consumers’ rights are breached. Also, it contributes to international debates devoted to public protection and complaints resolution, through constructive critique.

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Dancing away from Reform: The Inquest into the Death of Six Patrons of NSW Music Festivals – Sebastian De Brennan

In late 2019, the Deputy State Coroner for New South Wales (NSW), Magistrate Harriet Grahame, handed down her findings in relation to the death of six patrons of NSW music festivals. 179 pages in length, the decision represents a comprehensive attempt to understand recent music festival tragedies. The Coroner found that there was compelling evidence to support initiatives such as pill testing, changing the way festivals are policed (including discontinuing the use of sniffer dogs) and enhancing the overall safety of music festivals. The Coroner also questioned whether, in light of the evidence presented to the Inquest, there is a fundamental need to rethink contemporary approaches to drugs and criminalisation. In its response to date, the NSW Government has rejected the idea of pill testing and indicated that it will continue to use sniffer dogs at music festivals as a drug detection strategy. In one of the few recommendations of the Coroner that it has accepted, the NSW Government has agreed to the use of drug amnesty bins and agreed to a trial of less punitive measures of dealing with more minor drug possession offences via the use of Criminal Infringement Notices.

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Involuntary Sterilisation, Eugenics, and Physician-assisted Dying: Lessons for New Zealand – Gail Bingham

Opponents of physician-assisted dying (PAD) view it as modern eugenics and a significant risk to people with disabilities. The involuntary surgical sterilisation (ISS) of girls and

young women with intellectual disabilities is an example of eugenics in practice. This article reviews the social and political attitudes toward ISS and PAD in New Zealand, England, and the United States. The attitudes were compared to determine if they demonstrated any indicators of potential PAD-related harm for people with intellectual disabilities. The research identified several issues, which need to be considered to ensure the safety of people with intellectual disabilities if New Zealand was to legalise PAD. 707

Embryonic Regulation and Research: What Is the Status of Human Germline Genome Editing in Australia? – *Rose Burbery*

This article considers the status of human germline genome editing in Australia. Through an analysis of the current State, Territory and Commonwealth legal and ethical regulatory frameworks, and incorporating the capability approach to health justice proposed by Martha Nussbaum and Amartya Sen, the article argues that heritable alterations using CRISPR/Cas9 technology in a clinical context are inevitable in Australia, so the law needs to respond adequately to these scientific advances. The article concludes that human germline genome editing is currently not, and should not, be lawful in Australia, except for research purposes. 718

Australia after Cresswell and Chapman: A Legal and Regulatory Paradox, or an Opportunity for Uniformity? – *Christopher D Mills*

Australia, like many overseas jurisdictions, has recognised the need to cope with advancing medical technology and changing community attitudes towards assisted reproductive technology (ART). Despite this, several States in Australia still do not have legislative instruments regulating ART, and those that have legislated have done so in a non-uniform way. In 2018/2019, four cases came before State Supreme Courts, where the female applicants had to endure significant legal battle in order to utilise their late partner’s gametes, highlighting the inability of the law to provide an appropriate clinical framework. This article outlines and discusses the current position of Australian States on the utilisation of posthumous gametes and how the recent decisions of the Supreme Courts of New South Wales, Queensland and Western Australia augment the current law and National Health and Medical Research Council Guidelines, and finally, considers how future legislation might account for the potential posthumous utilisation of oocytes. 741

OBITUARY

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