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MONKEYPOX AND PUBLIC HEALTH LAW – *Editor: Ian Freckelton AO KC*

Responses to Monkeypox: Learning from Previous Public Health Emergencies – *Ian Freckelton AO KC and Gabrielle Wolf*

Since the 1970s, the zoonotic disease monkeypox was reported as appearing in humans, principally in central and west Africa. However, from May 2022, escalating numbers of persons worldwide contracted it. On 23 July 2022, the World Health Organization declared this outbreak to be a public health emergency of international concern (PHEIC) and initially observed that it was "concentrated among men who have sex with men, especially those with multiple sexual partners." The international public health response to monkeypox provides a litmus test to evaluate whether lessons have been learned from experiences of other infectious diseases in recent decades. This editorial identifies evidence of progress in the following areas: the declaration of a PHEIC in relation to monkeypox; some high-income countries' responses to monkeypox; naming of the virus, its variants and the disease it causes; protection of LGBTIQ+ communities and engagement of them to curb transmission of monkeypox; and efforts to ensure access to equitable vaccines. 967

LEGAL ISSUES – *Editor: Joanna Manning*

New Zealand's Bold New Structural Health Reforms: The Pae Ora (Healthy Futures) Act 2022 – *Joanna Manning*

New Zealand has implemented a transformative overhaul of its public health system. Regulated by the *Pae Ora (Healthy Futures) Act 2022* (NZ), the system has two key objectives: first, greater centralisation, with 20 regional district health boards replaced by two central commissioning agencies. New Zealand has a truly national health system for the first time, an aim being to end the "post code lottery". The second driver is to finally "get real" in tackling persistent inequities in health outcomes and access of disadvantaged groups, especially Māori, New Zealand's indigenous people, via various initiatives, including creation of a Maori Health Authority. A revolutionary aspect of the reforms is that the principles of the founding Treaty of Waitangi between Māori and the Crown have been embedded in the legislation as high-level guiding principles for all entities. Well-intentioned aims are a good start, but will need to be matched by realistic funding if the reforms are to have any chance of success. 987

MEDICAL ISSUES – *Editor: David Ranson*

Independent Death Investigation – The Challenge: The Report to the United Nations Human Rights Council of the Special Rapporteur on Extra-judicial, Summary of Arbitrary Executions – *David Ranson*

Around the world, death investigation takes place utilising a variety of medical, scientific, administrative and legal systems that are specific to the particular legal jurisdiction within which the death occurred. While an internationally agreed approach might be desirable, in practice the vicissitudes of the political, legal, educational and fiscal environments of different nations mean that there are considerable challenges to the notion of "independence"

when it comes to determining how and why a person died. In his recent report the Special Rapporteur on extra-judicial, summary or arbitrary executions outlined the initial results of his ongoing review into the challenges faced by medico-legal death investigators when attempting to uncover the cause and manner of potentially unlawful deaths and highlights some of the features of death investigation systems that limit the successful discharge of this duty. 1006

HEALTH LAW REPORTER – *Editor: Cameron Stewart*

Throwing a Cat among the Pridgeon(s): The New South Wales Court of Appeal and the Public Interest Test under the Health Practitioner Regulation National Law – *Cameron Stewart and Christopher Rudge*

This section examines the 2022 decision of *Pridgeon v Medical Council of New South Wales* in the New South Wales Court of Appeal that has taken a fundamentally different view of the public interest test employed in immediate action hearings under the *Health Practitioner Regulation National Law*. The section starts by examining the case and then looks at the approach taken by subsequent decisions. It will argue that the decision is substantially at odds with earlier authorities from all around Australia and fails to understand properly the meaning and purpose of the test. 1011

ARTICLES

Regulatory Investigations: Regulators, Regulatees and the Public Interest – *Arie Freiberg*

The potential for adverse consequences of investigations by a regulatory authority into complaints made against a person whom it regulates raises important questions about how regulators or similar bodies are, or should be, held accountable for their actions. This article examines the legal duties or other obligations that a regulator of health practitioners owes to people it regulates as well as to those who make complaints or submit notifications and to the public at large. It raises the general question of what duties or obligations any regulator or similar body with investigatory or coercive powers owes to persons arising out of its investigations. It finds that although they do not have a legal duty of care to a regulatee to protect them from harm, there may be other reasons why a regulator may want to consider the welfare of those whom it regulates as well as other affected parties. 1026

Managing Families' Expectations in the Coronial Jurisdiction: Barriers to Enacting an Ethic of Care – *Belinda Carpenter, Gordon Tait and Steph Jowett*

The coronial jurisdiction is different in function, character and procedure to most other legal processes in Australia, being inquisitorial rather than adversarial. It is also, by virtue of its focus on the circumstances of death, situated at the intersection of trauma and grief on the one hand, and legal exploration and evidence-gathering, on the other. For families a coronial investigation offers the potential for resolution about a death, but it can also exacerbate grief and trauma, particularly in the public forum of an inquest. This article utilises interviews with legal professionals engaged in the coronial jurisdiction to explore their understanding of the issues that impact upon families during a death investigation. Our findings indicate that an ethics of care is evident in the court but that this remains contingent on adequate resourcing of the sector, and that this is increasingly the case as the jurisdiction becomes more specialised. 1040

Knowledge of Chronic Traumatic Encephalopathy and Concussion Cannot Support a Negligence Suit against Major Sporting Organisations by Athletes. Or Can It? – *David Thorpe*

The settlement of the National Football League (NFL) Players Concussion Litigation was founded on a unique set of circumstances: in essence that the NFL investigated the risk of Chronic Traumatic Encephalopathy-like harm and then denied the risk. These circumstances are unlikely to be repeated in any of the thousands of lawsuits presently proposed by "non-NFL athletes" around the globe. These athletes face the far more difficult task of proving their overseeing sporting organisation had, or should have had, knowledge that repeated head trauma in playing contact sport can cause severe long-term cognitive harm, but to do so relying on "archived" reports dating back decades. 1052

Conscientious Objection in Australia: A Comparison between Abortion and Voluntary Assisted Dying – *Ronli Sifris*

Abortion and voluntary assisted dying (VAD) are areas of health care that elicit passionate and emotional responses. As a result of the diverse perspectives relating to these forms of medical care, Australian law allows for conscientious objection in both contexts. This article considers the role of conscientious objection in health care in Australia, with a particular focus on abortion and VAD. In begins by considering the legal position, highlighting some of the key differences in the way that conscientious objection is regulated in these two contexts and between Australian jurisdictions. It observes that jurisdictions which have legalised both abortion and VAD have not necessarily adopted the same approach to the question of conscientious objection as it pertains to abortion versus VAD. The article then turns to consider the reality of conscientious objection "on the ground" across these two domains in an effort to understand this distinction. 1079

Regulation in Need of Therapy? Analysis of Regulatory Decisions Relating to Impaired Doctors from 2010 to 2020 – *Owen M Bradfield, Matthew J Spittal and Marie M Bismark*

Doctors' mental wellbeing is a critical public health issue. Rates of depression, anxiety, and substance use are higher than in the general population. Regulating unwell doctors who pose a public risk is challenging, yet there is little research into how medical regulators balance the need to protect the public from harm against the benefits of supporting and rehabilitating the unwell doctor. We analysed judgments from Australia, New Zealand, Ireland, United Kingdom, Ontario, and Singapore between 2010 and 2020 relating to impaired doctors. We found similarities in how decision-makers conceptualise impairment, how they disentangle impairment from associated conduct or performance complaints, and how regulatory principles and sanctions are applied. However, compared to other jurisdictions, Australian courts and tribunals tended to prioritise deterrence above the rehabilitation of the impaired doctor. Supporting impaired doctors' recovery, when appropriate, is critical to public protection and patient safety. 1090

Acting Immediately – A Review of Recent Court and Tribunal Decisions Reviewing the Use of the Immediate Action Power under the National Law – *Jamie Orchard*

The power of National Boards to take immediate action under the *Health Practitioner Regulation National Law Act* to restrict the ability of health practitioners to practise is an important aspect of the regulator's drive to protect the public. This article examines the development of the law in respect of the use of the power, primarily by reference to court and tribunal decisions across the various jurisdictions in Australia. Some of the key principles from the decisions are identified as well as certain areas in which the law is still developing and may be a little uncertain. 1109

Voluntary Assisted Dying, the Conscientious Objector Who Refuses to Facilitate it and Discrimination Law – *Anthony Gray and Kerstin Braun*

This article discusses the aspect of recent voluntary assisted dying (VAD) laws dealing with a health care provider who declines to provide VAD services. While the law permits the provider to do so, it is sometimes less clear what, if anything, they must do to facilitate VAD service provision by others. Legislation in three jurisdictions is silent on the matter. This article considers refusals to facilitate VAD services, in light of human rights provisions, particularly anti-discrimination legislation, and the guidance available internationally. Existing VAD literature does not consider discrimination arguments in relation to refusal to participate. 1128

Voluntary Assisted Dying Act 2021 (Qld): Conscientious Objection Controversies – *Halie Geissmann*

The right to conscientious objection has been reflected in multiple Australian jurisdictions for different purposes. The *Voluntary Assisted Dying Act 2021* (Qld) provides for conscientious objection and the scope of these provisions has proved a contentious topic. Through applying casuistical approaches and a rights-based ethical perspective, this article seeks to determine whether the referral requirement for objecting practitioners appropriately infringes on a practitioner's right of conscientious objection; whether the scope of professionals eligible to object conscientiously has been appropriately formulated; and whether an obligation to refer without a penalty for failure is a sufficient patient safeguard. The discussion concludes with possible considerations for future amendments to the *Voluntary Assisted Dying Act*. 1150

First Nations Perspectives in Law-Making About Voluntary Assisted Dying – *Sophie Lewis, Lindy Willmott, Ben P White, Camille La Brooy and Paul Komesaroff*

Voluntary assisted dying laws have now been enacted in all six Australian States with reform being considered in the remaining two. While there is an emerging body of literature examining various aspects of regulation, there has been scant consideration of what these reforms mean for First Nations peoples, and to what extent their experiences have been considered in the process of developing legislation. This article provides a critical analysis of how Indigenous perspectives both contributed to, and were engaged with, during the law reform processes in Victoria and Western Australia, the first two States to grapple with this topic. Findings reveal the sophistication in how Indigenous organisations and individuals engaged with this issue and highlight the critical importance of not universalising Indigenous perspectives. Significantly, there was much greater engagement with Indigenous views in Western Australia than in Victoria. We conclude by considering how Indigenous voices can meaningfully influence Australian law reform processes. 1168

Emerging Issues from COVID-19 in the Australian Workplace – *Robert Guthrie, Robert Aurbach and Marina Ciccarelli*

This article addresses a range of workplace issues, with a focus on workers' compensation and return to work, and employment law and related medical issues after the outbreak and spread of COVID-19 in Australia since 2020. It will briefly address some changes to the insurance industry generally and then consider the sometimes complex issues arising from workers' compensation claims, which have changed behaviours in claims and injury management. It concludes the theme emerging from decided cases to date that employers, insurers, and rehabilitation providers must adopt a reasonable approach to the consultation and implementation of workplace changes affecting injured workers subject to return-to-work programs. 1182

Medical Intervention as a Novus Actus Interveniens: Giving Meaning to the Concept of Gross Clinical Negligence – *Louis Baigent*

The focus of this article is the notion that only grossly negligent conduct by a health care provider will constitute a novus actus interveniens and break the chain of causation between a tortious act and the ultimate harm suffered by a plaintiff. More precisely, it explores the question of what it means for a health care provider to be grossly negligent. Its purpose is not to devise an exhaustive list of acts or omissions likely to constitute grossly negligent medical treatment; it is not necessary or even prudent to do so. However, it is argued that more clearly defined parameters are needed to distinguish ordinary, actionable negligence from gross negligence in a clinical context. 1201

Standard of Care in Medical Malpractice: Deference, Daubert, or Different Direction – *Michael Gvozdenovic*

This article explores the effect of *Daubert v Merrell Dow Pharmaceuticals Inc* on the standard of care in United States medical malpractice proceedings. It posits that the significance of *Daubert* should not be viewed from the perspective of who should be permitted to testify as to the standard of care. Rather, the decision signals the need to reform what should be the content of that standard. Specifically, the Supreme Court, in overruling *Frye v United States* and imposing a "gatekeeper" role on trial judges, reasoned with the aim of producing more reliable expert evidence. This object would be best realised if doctors are required to testify in respect of whether the conduct in question was "reasonable", not whether it was in accordance with the thinking of other practitioners (as demanded by the current "deferential" standard of care). 1220

The Role of the Medical Profession in Occupational Lung Disease and Access to Compensation – *Sally Weir, Leah O'Keefe and Ross Sottile*

The relationship between exposure to toxins at work and lung diseases continues to be significantly under-recognised in Australia. Medical practitioners are well placed to identify occupational risk factors for disease. They can therefore play a vital role in informing regulatory responses, highlighting dangerous workplaces and supporting access to compensation to assist with better health outcomes for their patients. Increased awareness among medical practitioners of occupational factors can aid early diagnosis and improve patient outcomes by improving access to justice. Medical practitioners should be cognisant of the occupational causes of lung disease in Australia to support appropriate specialist referral and ensure patients can access additional support systems available through legal compensation systems. More broadly, medical professionals and lawyers assisting workers share the common aim of highlighting preventable diseases and advocating for change to help make workplaces safer. 1236

Autonomy Versus Integrity: The "Mind" and its "Body" in the Law – *Chris Dent*

The law has changed, over the past century, in respect of how it sees the legal subject. From the 1980s, the law began to articulate an understanding of the "mind" of those who came before the courts. This is evident in decisions around nervous shock in negligence law. The law also began to articulate a distinction between the "mind" and the "body" – evident in the law of consent to health treatment. The engagement of the courts with the development of the capacity of children to consent, in particular, when tied with the idea of "abstraction", allows for an in-depth exploration of the concepts. The assessment of the law in the two areas, in turn, facilitates an exploration of the law's understanding of the "autonomy" and the bodily "integrity" of the legal subject. 1241

Management of Behaviours in Dementia: Treatment or Restraint? – *Rohan Wee*

The use of antipsychotic medication in the management of behaviours of concern in dementia is complex. Antipsychotics may be part of medical treatment or be a restrictive practice. The uncertainty around consent for restrictive practices exposes patients to the risk of antipsychotic use without consent and doctors to the risk of liability. This situation is even less clear in Victoria following the ruling in *HYY* [2022] VCAT 97. This article examines the process of consent, the potential liabilities and possible defences. It concludes that changes are needed to the process for obtaining consent to use antipsychotic medications for restrictive practices, especially in Victoria. 1255

Consent Rights of Gender Diverse Children in Australia and the United Kingdom: Will the Court's Involvement End? – *Georgina Jacko*

Gender diversity allows individuals to express their innate sense of self and has been increasingly recognised over time. Consequently, paediatric gender services have seen exponential increases in referrals internationally. This has resulted in novel issues for courts, such as a child's "best interests" when accessing puberty-suppressing and gender-affirming medical care. Most recently, in the United Kingdom, the adequacy of information provided to transgender children and their families was also debated. Progression of the common law in Australia has resulted in transgender children consenting to medical treatment once *Gillick* competent. Yet, *Bell v Tavistock* [2020] EWHC 3274 temporarily halted the care of the United Kingdom's transgender children, who were previously afforded consenting rights. On appeal it was determined to be inappropriate for the divisional court to have provided generalised guidance on children's capacity to consent to medical therapy. Through comparative analysis of case law, the adequacy of these regulations will be assessed. 1269

CASE NOTE

Stanley v Finnegan: Child Abuse and Bad Medicine – *Adam Jardine and Marilyn Bromberg*

In April 2020 American President Donald Trump publicly stated that consuming disinfectant could cure COVID-19. This apparently shocking statement was not so shocking to many: some people believe that consuming Miracle Mineral Solution (MMS), a name for chlorine dioxide, an industrial bleach, can cure many illnesses. This article is a case note about *Stanley v Finnegan*, 447 F Supp 3d 771, 777 (WD Ark, 2020), in which parents sued their local county and sheriff in Arkansas for taking their children away after they encouraged their children to consume MMS. This case is particularly important in the current COVID-19 world. 1288

BOOK REVIEW

A Time of Terror: The Black Death in Sydney, by Peter Curson 1298

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