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EDITORIAL – *Editor: Ian Freckelton AO KC*

Coroners' Inquests and Criminal and Disciplinary Law – *Ian Freckelton AO KC*

Coroners' inquests in Australia and New Zealand are no longer formally part of the criminal justice process. However, they can take place after the resolution of criminal charges and, although coroners' findings cannot be expressed in terms of persons' criminality, inquests can also result in referrals to prosecuting authorities. In addition, referrals to professionals' disciplinary regulators can be made by coroners. The potential for such adverse outcomes for the individuals affected makes it essential for those representing parties or witnesses at coronial hearings to consider carefully the forensic strategies that they deploy and, in particular, the advice that they provide, including in relation to claims to the privilege against self-incrimination. By reason of the partial abolition of the doctrine of autrefois acquit in a number of Australian jurisdictions, the potential for new and compelling evidence to emerge during an inquest takes on additional significance for persons who have been found not guilty of offences such as a murder at a previous trial. 259

HEALTH LAW REPORTER – *Editor: Cameron Stewart*

The Standard of Care Test Revisited: Competing Approaches to Defining Competent Profession Practice in Australia – *Cameron Stewart and Peter Kim*

This section examines the recent decision of the New South Wales Court of Appeal in *Dean v Pope* [2022] NSWCA 260. The decision settles a long-running dispute in New South Wales about the test for the standard of care under s 5O of the *Civil Liability Act 2002* (NSW). That provision was introduced following the medical indemnity crisis of the early 2000s and provided for a modified *Bolam* test to protect professionals from claims in negligence when they had acted in accordance with a standard of "competent professional practice". In recent years there has been controversy regarding whether that section required the practice to be one already established to satisfy the section. This section examines the decision, how it fits into the history of the Ipp reforms and what it means for other jurisdictions in Australia. 278

GENOMIC LAW COLUMN – *Editor: Dianne Nicol*

The Patent Landscape for CRISPR Genome Editing in Australia – *Naomi Foo, Olumayowa Adesanya, Jane Nielsen and Dianne Nicol*

Although Australia has a proud record of health and medical research, it finds less traction when it comes to innovative product development. Patent filings are recognised as one of the measures of national innovation, and this is one measure where Australian innovators are falling short. We examined whether there may be discrete pockets of innovation in particular areas of technology where Australian researchers are making significant contributions. This study used patent filings as a measure of innovation and used clustered regularly interspaced short palindromic repeat (CRISPR) genome editing as a case study. We found a rich patent landscape, with filings for general methods and compositions and

for specific diseases. However, the contribution by Australian applicants was small, with only four out of 519 filings. This indicates that navigating the CRISPR patent landscape to secure freedom to operate is likely to be complex for Australian innovators in this field. 286

PUBLIC HEALTH LAW COLUMN – *Editor: Paula O'Brien*

Welcome to Television: Regulating Alcohol Marketing on Television in Australia to Protect the Health of Young People – *Paula O'Brien*

Television content is now available whenever and wherever viewers want it through free-to-air commercial television, catch-up television, video-on-demand services whether subscription or free, and social media platforms such as Facebook and TikTok. Alcohol marketing is pervasive in television, with young people's exposure to such marketing being causally connected to harms such as early initiation to drinking and heavy drinking practices. The World Health Organization recommends that countries ban or place comprehensive restrictions on alcohol marketing. Australia has failed to heed this recommendation. This column reviews the regulation of alcohol marketing in Australia from the perspective of its capacity to protect young people from exposure to the marketing. Australia's regulation of alcohol marketing is weak, fragmented and outdated, with rules that favour the interests of the alcohol, media and sporting industries, and do not protect the public's health, particularly that of young people. 310

ARTICLES

Sharing of Genomic Data: Exploring the Privacy Implications of the Changing Status of Genomic Data – *Margaret Otlowski and Lisa Eckstein*

This article explores the privacy implications of the changing status of genomic data and the consequences for genomic data-sharing. It sets out the theoretical framework for privacy protection in Australia and the centrality of the concept of "personal information" – information from which an individual is "reasonably identifiable". It examines the applicability of this legal framework to genomic data and the challenge from the ever-growing risk of identifiability of such data and implications for research participation and researchers' willingness to share genomic data. The article critiques the binary approach underpinning Australian privacy law based on whether data are "identified" or "de-identified" and highlights the difficulty of applying this distinction to genomic data given their changing status over time. It concludes by examining necessary reforms to provide individuals with more effective privacy protection over their genomic data and which would support data-sharing for genomic research. 326

Legal Liability of Clinical Ethics Services in Australia: "Should I Be More Worried Than I Am?" – *Sharon L Feldman and Carolyn Johnston*

A key function of clinical ethics services (CESs) is to provide decision-making support to health care providers in ethically challenging cases. Cases referred for ethics consultation are likely to involve diverging views or conflict, or to confront the boundaries of appropriate medical practice. Such cases might also attract legal action due to their contentious nature. As CESs become more prevalent in Australia, this article considers the potential legal liability of a CES and its members. With no reported litigation against a CES in Australia, we look to international experience and first principles. We consider the prospects of a claim in negligence, the most likely legal action against a CES, through application of legal principles to a hypothetical case scenario. We conclude that, although unlikely to be successful at this time, a CES could face answerable claims in negligence brought by patients (and families) who are the subject of ethics case consultation. 345

The Duty of Care to Protect Employees against the Risk of Psychiatric Harm from Vicarious Trauma: *Kozarov v Victoria* – *Russ Scott and Ian Freckelton AO KC*

An employer owes every employee a duty to take all reasonable steps to provide a safe place and system of work. Whether an employer will be liable for psychological harm suffered by an employee will depend on the particular circumstances of the case. In *Kozarov v Victoria* (2022) 273 CLR 115; [2022] HCA 12 (*Kozarov*), the High Court considered whether the Victorian Office of Public Prosecutions had been placed on notice of a risk of "vicarious trauma" to a solicitor employed in the Special Sexual Offenders Unit and whether it was required to make a response by taking active steps including offering a rotation to another section where the solicitor did not to have to manage cases of child rape and other sexual offences of gross depravity. The High Court also considered whether by failing to advise her employer of her developing mental illness in a timely way and not accessing the Employee Assistance Program, the solicitor had failed to take reasonable care of her mental health. The article argues that the *Kozarov* decision is likely to prove a landmark in terms of employers' occupational health and safety responsibilities in respect of exposure to vicarious trauma. 358

The Statutory Standard of Care in Australia and its Application to Experimental Medical Practice – *Perry Peralta*

Clinical innovation is essential in the development and improvement of interventions used to treat medical conditions. In Australia, the States and Territories have statutorily reintroduced the *Bolam principle* in a modified form which provides a defence for medical practitioners who have practised in a manner that, at the time, was widely accepted in Australia by peer professional opinion as competent professional practice. This article explores whether the standard could be successfully pleaded as a defence by experimental practitioners. In doing so, the obstacles to an experimental practitioner's ability to rely on the statutory defence are analysed. It finds that the standard effectively entrenches established practices without sheltering legitimate efforts to advance medicine. 390

Relatives' Right to Know Genetic Information in Aotearoa New Zealand – *Christian Poland*

Once someone is diagnosed with a genetic abnormality or disorder, that information can be extremely valuable to their biological relatives. It may allow them to access preventive treatment or make informed decisions, such as whether to have a biological child or not. However, when the original family member refuses to disclose that information to at-risk relatives, a conflict arises between their right to patient confidentiality and their relatives' right to know. Aotearoa New Zealand lacks a specific, workable mechanism for disclosing genetic information to at-risk relatives. This article traverses the theoretical and practical issues involved in non-consensual disclosure of genetic information to suggest a new path for Aotearoa. It argues that the current, Western attitude of autonomy as an individual right free from obligations to others is no longer an appropriate justification for confidentiality over genetic information. Instead, patients diagnosed with a genetic abnormality or disorder should only be entitled to confidentiality where they have a reasonable expectation of privacy – determined by weighing the objective interests for and against disclosure. This approach recognises that we ought to consider our close relationships with others when we exercise autonomy over what is ultimately shared family information. 410

The Treatment of Young Transgender People and the Law – *Anthony Gray*

The law has slowly recognised the concept of a transgender person. After initially fixating on someone's physical birth gender, it has now accepted the concept of gender identity. It has been challenged by young people experiencing gender dysphoria seeking medical treatment. Though in recent years it has increasingly accepted the right of such a person to

access appropriate treatment, this article suggests further improvements in this area of the law are desirable, including no longer making the distinction between therapeutic and non-therapeutic treatment, reforming the extent of judicial power in this context, and according greater autonomy to mature young people. 430

Supporting the Involvement of Adults with Cognitive Disabilities in Research: The Need for Reform – *Shih-Ning Then, John Chesterman and Yuu Matsuyama*

This article examines current legal and ethical requirements concerning research about adults with cognitive disabilities. These requirements, the article argues, are complex, difficult to navigate, and inevitably act as a disincentive for research to be conducted. These requirements also do little to encourage active involvement by adults with cognitive disabilities in deciding whether to participate in research. The article argues that reforms are needed for State and Territory laws to require, wherever possible, adults to be supported to make their own decisions about research participation. State and Territory law reform is also required to clarify when, and on what basis, others may be appointed to make research participation decisions on behalf of adults with cognitive disabilities. The article concludes by seeking complementary reform of the National Health and Medical Research Council National Statement on Ethical Conduct in Human Research, which would result in it being more human rights compliant and simpler to apply. 459

The Continuing Problem of Expert Evidence in Medical Litigation – A Surgical Perspective with Reference to *Daubert* – *Arthur Richardson, Helen Pham and Michael Hollands*

The tension that exists between the medical and legal professions regarding expert evidence is longstanding. In this article, we will examine some of the issues regarding expert evidence particularly as it relates to matters involving surgeons. Many of the current aspects of the Australian uniform evidence law in relation to expert testimony were based on the Federal Rules of Evidence promulgated in the United States in 1975. We will discuss some of the problems of expert evidence in surgical matters, particularly in New South Wales, and offer some thoughts on how the so-called *Daubert* trilogy could form a basis on which to re-examine the concept of an "expert". Our analysis offers suggestions for further improvements to the process of adducing expert evidence in claims involving surgical matters. 472

An Australian Sugary-sweetened Beverage Levy: Why, What and How? – *Meredith Blake, Marilyn Bromberg and Stephanie Milan*

Sugar-sweetened beverages (SSBs) are associated with overweight/obesity and linked to chronic diseases. A levy or tax on SSBs has been introduced in many jurisdictions globally as a way to lower sugar consumption and/or reformulate lower sugar levels in order to address increasing rates of overweight and obesity. In this article we describe the various approaches to SSB taxation in these jurisdictions. We then explore the legal and policy landscape relevant to the introduction of an SSB levy in Australia. We argue that there is a mandate for the Australian government to introduce such a tax given the clear evidence that consumption, and therefore the adverse associated health outcomes, have a disproportionate impact upon those from lower socio-economic communities. We ultimately recommend that the tax take the form of an excise which focuses on changing industry practice, based on the success achieved by the United Kingdom tax. 488

BOOK REVIEW

Lockdown, by Chip Le Grand 499