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GUEST EDITORIAL

Commercial surrogacy: What role for law in Australia? – *Ronli Sifris*, *Karinne Ludlow* and *Adiva Sifris*

This editorial begins by illuminating current conversations regarding the regulation of commercial surrogacy in Australia. It defines "commercial surrogacy" and explains the interaction between changes in social attitudes and changes to the law before setting out the current Australian law and practice in this area. An examination of current domestic law and practice reveals that surrogacy legislation in Australia is mired in inconsistencies and a lack of uniformity but that the one key common element is the prohibition of commercial surrogacy. The inability of couples to access commercial surrogacy within Australia has led to offshore reproductive tourism and unpredictable, contradictory decision-making as the Family Court attempts to apply legislation which was never intended to apply in this context. The editorial then turns to consider the international arena, discussing the approach of the Hague Conference on Private International Law before delving into a human rights analysis of commercial surrogacy arrangements. The adoption of a rights-based approach requires an analysis of this vexed issue from the perspective of the child, surrogate and intending parents. While questions surrounding the human rights implications of legalising commercial surrogacy continue to be the subject of passionate debate, the authors believe that the human rights of all parties are best protected through appropriate regulation rather than absolute prohibition. 275

LEGAL ISSUES – *Bernadette McSherry*

Defining seclusion and restraint: Legal and policy definitions versus consumer and carer perspectives – *Cath Roper*, *Bernadette McSherry* and *Lisa Brophy*

The practices of seclusion and restraint may be used in a variety of health settings to control behaviour. Laws and policies that seek to regulate these practices define seclusion and restraint in various ways and there are gaps as to which practices are regulated and in what circumstances. This column provides an overview of consumer and carer perspectives as to what is meant by these practices. 297

MEDICAL ISSUES – *David Ranson*

The dangers of dementia: Getting the balance right – *Ross Bicknell*, *Joseph Ibrahim*, *Lyndal Bugeja* and *David Ranson*

Australia's population is ageing and it is likely that there will be a threefold increase in the number of people living with dementia in the next 30 years. Caring for these individuals will incur a significant burden on our community both fiscal and personal. How we provide this care will say much about our compassion for and commitment to caring for those who are no longer part of the productive workforce. Individuals with dementia are a heterogeneous group with a wide range of function and capacity. Nevertheless, their impairment often requires a high level of formal care in order to reduce the risk of harm to themselves and others in the community. The imposition of such care arrangements can be invasive of their autonomy and in some cases their liberty. 303

BIOETHICAL ISSUES – *Grant Gillett*

Lecretia seales and aid in dying in New Zealand – *Grant Gillett*

The application by Lecretia Seales, in relation to the lawfulness of physician aid in dying in New Zealand, was heard by Collins J, an experienced medical jurisprudentialist. It raised issues re-ignited by the recent Supreme Court of Canada ruling in *Carter v Canada* and the legislative change in California. Is a continued prohibition in Australasia and the United Kingdom against physician aid in dying causing patients to be subjected to cruel, inhumane and undignified deaths or, in fact, is a legislative change unnecessary given the level of care that patients can receive and the peaceful and harmonious deaths that we often hear about in hospice and other settings. A range of arguments, some traditional and some very contemporary, were canvassed in the case of Lecretia Seales and Collins J considered each of them, commenting in detail both on points of law and matters of ethical substance. A study of his judgment therefore makes fascinating reading for those interested in end-of-life decisions and the way they are dealt with in different developed world jurisdictions, and in particular, how such ethical matters may be considered from the point of view of indigenous and marginalised cultures. 308

NURSING ISSUES – *Kim Forrester*

The role of observation and feedback in enhancing performance with medication administration – *Karen Davies*, *Charles Mitchell* and *Ian Coombes*

Legislation in Queensland such as the *Health (Drugs and Poisons) Regulation 1996*, the national registration competency standards set by the Nursing and Midwifery Board of Australia, and the Continuing Professional Development Registration Standards made pursuant to the *Health Practitioner Regulation National Law* define expected standards of practice for nurses. The Framework for Assessing Standards for Practice for Registered Nurses, Enrolled Nurses and Midwives, released in July 2015, includes the principles for assessing standards but not the methods. Local policies and procedures offer specific requirements founded on evidence-based practice. Observation of clinical practice with the provision of immediate descriptive feedback to individual practitioners has been associated with improved performance. This column describes the role of regular observation and individual feedback on medication administration as a strategy to enhance performance and patient care. 316

MEDICAL LAW REPORTER – *Thomas Faunce*

Myriad voices against gene patents in the High Court – *Lucas McCallum* and *Thomas Faunce*

The Australian High Court's recent landmark decision in *D'Arcy v Myriad Genetics Inc* overturned the decision by the Federal Court in *Cancer Voices Australia v Myriad Genetics Inc* regarding patenting of genetic material. The Federal Court had found that isolated DNA and RNA can constitute a patentable invention under s 18(1)(a) of the *Patents Act 1990* (Cth). The decision by the High Court unanimously reversed this and declared it was appropriate to look to the policy implications at the heart of the legal question: are genes a category of things that can be patented? This column critically examines the implications of the High Court decision for both research and public health in Australia. 322

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SPECIAL ISSUE NOTE AND ARTICLES

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The regulation of commercial surrogacy: The wrong answers to the wrong questions – *Anita Stuhmcke*

The criminal ban on commercial surrogacy across Australian jurisdictions is the result of the conflation and confusion of two flawed assumptions. The first being that the criminalisation of commercial surrogacy will discourage a surrogacy "industry" and the second that commercial surrogacy and altruistic surrogacy are two distinguishable "types" of surrogacy arrangements. This article argues that the criminalisation of commercial surrogacy has resulted in unforeseen and undesirable consequences, removing opportunity for evidence-based law reform. Moreover, analysis of both the approach of Australian courts and the operation of surrogacy legislation suggests that the binary regulatory approach which distinguishes "commercial" from "altruistic" surrogacy is a legal fiction. In summary, this article argues that the current Australian regulation of surrogacy is both blunt and ineffectual, surrogacy is a nuanced and complex practice which requires a regulatory response which is principled, holistic and evidence based. 333

Responsive regulation of cross-border assisted reproduction – *Jenni Millbank*

This article considers the question: how might Australian regulators constructively respond to the dynamic and complex challenges posed by cross-border assisted reproduction? To begin, the article summarises the available international scholarship and outlines what little we know about Australian cross-border reproductive travel. Of the three generally proposed responses to cross-border reproductive care (prohibition, harm minimisation and harmonisation), the article summarily rejects the first approach, and instead discusses a mixture of the latter two. The article proposes the beginnings of an immediate policy response aimed not at stopping cross-border practices per se, but rather at understanding and reducing the risks associated with them, as well as flagging the pursuit of more ambitious meta-goals such as developing more equitable and accessible treatment frameworks for assisted reproductive technology and encouraging domestic self-sufficiency in reproduction. 346

Commercial surrogacy and the human right to autonomy – *Ronli Sifris*

Arguments against commercial surrogacy frequently focus on the rights of the surrogate. For example, those opposed to commercial surrogacy often argue that surrogacy arrangements amount to the exploitation of women and the commodification of their wombs. Phrased in the language of rights, such arguments draw on the right to be free from degrading treatment and the right to be free from discrimination. In contrast, those who support commercial surrogacy refute the arguments relating to exploitation and commodification and cite the right to work and more commonly the right to privacy / autonomy as the key rights in question. This article focuses on the human right to autonomy and interrogates whether prohibitions on commercial surrogacy violate the right of a woman to choose to be a surrogate. 365

Genes and gestation in Australian regulation of egg donation, surrogacy and mitochondrial donation – *Karinne Ludlow*

This article considers genetic and legal relatedness for the purposes of Australian regulation of egg donation, surrogacy and parentage by examination of that regulation through the lens of mitochondrial (mt) donation. The article addresses whether mt donors would be a child's genetic parents following clinical use in that child's conception should mt donation be legalised for such use in Australia. It then considers how genetic and

gestational relatedness are relevant in the discourse around legal parentage following egg donation and surrogacy and argues that the current approach is in need of reform so that intending parents of all children are deemed to be the resulting child's legal parents at birth. 378

The Family Courts and parentage of children conceived through overseas commercial surrogacy arrangements: A child-centred approach – *Adiva Sifris*

This article adopts a child-centred approach to the vexed issue of commercial surrogacy. These arrangements are prohibited throughout Australia. Nevertheless, Australians are travelling overseas and entering into commercial surrogacy arrangements. This article addresses the dilemma confronting the Family Courts when the commissioning parents and the child return to Australia. Should the Family Courts make parenting orders enabling the commissioning parents to raise the child? Alternatively, should they make parentage orders legally recognising the commissioning parents as the child's parents? After exploring the existing legislative structure and its application, the interest theory of children's rights is utilised to justify changes to the law so that the commissioning parents are regarded as the child's legal parents. 396

ARTICLES

Medical and scientific authorship: A conflict between discipline rules and the law – *Elizabeth Adeney*

When the results of medical collaborations are to be published, questions of authorship arise. Which members of the research team are to be acknowledged as authors of the paper? In what order are they to be acknowledged? Institutional rules will generally determine the attribution of authorship to members of the research team. However, those rules are most unlikely to be consistent with the legal rules governing authorship and its attribution, most of which will apply regardless of a team's adherence to institutional rules. This article examines the meaning of authorship in the medical community, and in the legal community under the copyright laws. It considers various formulations of the institutional rules governing authorship, as well as editorial practices. Through consideration of a hypothetical scenario, the consequences of the disparity between authorship norms in law and in medicine are elaborated. 413

Foetal Alcohol Spectrum Disorders: A consideration of sentencing and unreliable confessions – *Heather Douglas*

While Foetal Alcohol Spectrum Disorders (FASDs) are now a strong focus of policy-makers throughout Australia, they have received strikingly little consideration in Australian criminal courts. Many people who have an FASD are highly suggestible, have difficulty linking their actions to consequences, controlling impulses and remembering things, and thus FASD raises particular issues for appropriate sentencing and the admissibility of evidence. This article considers the approach of Australian criminal courts to FASD. It reviews the recent case of *AH v Western Australia* which exemplifies the difficulties associated with appropriate sentencing in cases where the accused is likely to have an FASD. The article also considers the implications for Australian courts of the New Zealand case of *Pora v The Queen*, recently heard by the Privy Council. In this case, the Privy Council accepted expert evidence that people with FASD may confabulate evidence, potentially making their testimony unreliable. The article concludes with an overview of developments in criminal policy and legal response in relation to FASD in the United States, Canada and Australia. 427

Cutting the cord: Can society over-invest in extremely premature and critically impaired neonates? – *Neera Bhatia*

This article provides a critical examination of the allocation of scarce public health care funds in relation to extremely premature and sick neonates. Decisions to withdraw or withhold life-sustaining treatment from neonates born extremely premature are generally informed by arbitrary and often subjective considerations of those involved in their care – namely parents and medical practitioners. This article argues for a sharp and immediate focus in decisions to treat such neonates based on the allocation of limited health care resources. Accordingly, decisions to save and preserve the lives of imperilled neonates should not be limited to the immediate financial costs of medical treatment. More explicitly there should be a full appreciation of the cost of disability to the family, requirements for long-term care, and the benefits and associated costs of life, not only to the patient, but also to society. 443

Nazi medical experiments on Australian prisoners of war: Commentary on the testimony of an Australian soldier – *George M Weisz*

Archival research reveals that Australian prisoners of war were exposed to non-consensual medical experiments during World War II. This article discusses the first known case of an Australian soldier exposed to German medical experiments. 457

A problem of modernity: Dual burial plots, the right to inter, and the interrelationship between the two – *Lynden Griggs*

Vosnakis v Arfaras directly raises the issue as to how private law will resolve the tensions that can exist between family members in relation to burial licences and the right to inter. In evoking contract, property, and statute, the case reveals the complexity associated with this area, specifically in relation to dual burial plots, and how rather simple family disputes can escalate significantly beyond their economic worth. Recommendations to include a registry system to record details of funeral arrangements is encouraged to ensure that the many thousands of dollars spent by the litigants in this case is not repeated by other families. This, along with courts being required to give effect to the wishes of the deceased, will provide a clarity that is currently missing. In a time when the population is increasing, a changed dynamic to family life in Australia, and less land available for internment, the problem of the relationship of a dual burial licence and the right to inter is one of modernity, but one to which the community should expect the application of policy initiatives to complement a coherence within the legal position. This coherency and such policy initiatives are currently lacking but, with simple measures, this position can be rectified. 460

Our Father who art in prison: Conviction and rehabilitation for Australian Catholic clergy who are child sexual offenders – *Mike O'Connor*

In light of the Royal Commission into Institutional Child Sexual Abuse, this article analyses the custodial sentences of 143 Australian Catholic clergy. The majority of these sentences were for convictions for indecent assault for which the median sentence was two years' imprisonment. It is doubtful whether the Australian community would consider such sentences as adequate, particularly where offences were against children. Current Australian legislation allows for ongoing long-term sanctions, including judicial orders for chemical castration, to be imposed on convicted sex offenders, especially those assessed as being at high risk of re-offending. Clergy on parole are likely to be prohibited from resuming most pastoral responsibilities on the grounds of high actuarial risk of re-offending, but what limited data are available suggests that priests may have low rates of re-offending. If priests do have low rates of recidivism, what then should the Catholic

Church do about priests convicted of child sexual abuse offences who want to return to pastoral work and how might they be managed and monitored? Laicisation of offender priests will inevitably produce ostracism and isolation which are conducive to re-offending. 471

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