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EDITORIAL

Perils of Precipitate Publication: Fraudulent and Substandard COVID-19 Research – Ian Freckelton QC

The COVID-19 pandemic has created an environment highly conducive to substandard and fraudulent research. The incentives and temptations for the unethical are substantial. The articles published during 2020 in *The Lancet* and the *New England Journal of Medicine* that were based on spurious datasets, allegedly hosted by a cloud-based health care analytics platform, are deeply confronting for research integrity. They illustrate the perils of precipitate publication, inadequate peer-reviewing and co-authorship without proper assumption of responsibility. A period of crisis such as that in existence during the COVID-19 pandemic calls for high-quality research that is robustly evaluated. It is not a time for panic to propel premature publication or for relaxation in scholarly standards. Any other approach will replicate errors of the past and result in illusory research breakthroughs to global detriment.

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LEGAL ISSUES – *Editor: Ian Freckelton QC*

COVID-19: Criminal Law, Public Assemblies and Human Rights Litigation – Ian Freckelton QC

Australia’s criminal law was affected by the COVID-19 pandemic from the outset and then progressively as statutory measures and judicial rulings on matters such as bail entitlements, judge-alone trials, sentences and applications for demonstrations and public assemblies were made by courts. This column identifies some of the major decisions made during the period of the lockdown measures between March and July 2020, and reviews significant New South Wales judgments in relation to the lawfulness of mass gatherings during the period of lockdown as expert assessments of risks of community transmission of the virus waxed and waned. It explores the importation into Australia’s criminal law of public health principles for the protection of the community, and its compatibility with traditional principles of criminal justice.

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MEDICAL ISSUES – *Editor: David Ranson*

COVID-19 and Forensic Medical Practice – David Ranson

The COVID-19 pandemic has affected the community in multiple ways. These include direct health impacts on those infected and indirect health impacts on others who may, through fear of infection, not avail themselves of available “face-to-face” health care services. The impact of COVID-19 on the legal system and the related medico-legal services it relies upon has received less attention but the ongoing social restrictions put in place because of the pandemic have the capacity to disrupt a range of legal processes. The impact of the pandemic has the capacity to interfere with both forensic medical and legal processes both in the short term and the long term. It may take some time for the potential harms to be realised but as the pandemic gradually comes under control from a public health perspective the interference to criminal and civil justice will start to become more visible.

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How COVID-19 Highlights an Ongoing Pandemic of Neglect and Oppression When It Comes to Women’s Reproductive Rights – *Hannah G Dahlen, Bashi Kumar-Hazard and Mary Chiarella*

The coronavirus disease-19 (COVID-19) pandemic has exposed an underlying pandemic of neglect affecting women’s reproductive rights, particularly in the provision of abortion services and maternity care. The systemic neglect in the Australian context has resulted in a rise in demand for the services provided by privately practising midwives (PPMs) that is not matched by systemic support for, nor recognition of, women choosing to birth at home. As a result, PPMs are unable to meet the rise in demand, which in itself reflects decades of limited State support for the choice to birth at home and opposition by incumbent stakeholders in the provision of maternity care to healthy women with low-risk pregnancies. We discuss the historical backdrop to these currently erupting issues, along with the real reasons for the opposition to PPMs in Australia. Finally, we offer solutions to this ongoing issue.

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GENOMIC LAW ISSUES – *Editor: Dianne Nicol*

Australian Perspectives on the Ethical and Regulatory Considerations for Responsible Data Sharing in Response to the COVID-19 Pandemic – *Dianne Nicol, Don Chalmers, Christine Critchley, Lisa Eckstein, Jane Nielsen and Margaret Otlowski*

As the rush to understand and find solutions to the coronavirus disease 2019 pandemic continues, it is timely to re-examine the legal, social and ethical drivers for sharing health-related data from individuals around the globe. International collaboration and data sharing will be essential to the research effort. This raises the question of whether the urgent imperative to find therapies and vaccines may justify some temporary rebalancing of existing ethical and regulatory standards. The Global Alliance for Genomic Health is playing a leading role in collecting information about national approaches to these challenging questions. In this section, we examine some of the initiatives being taken in Australia against this global backdrop.

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HEALTH LAW REPORTER – *Editor: Cameron Stewart*

Suicide-related Materials and Voluntary Assisted Dying – *Cameron Stewart, Ian Kerridge, Camille La Brooy and Paul Komesaroff*

This column discusses the potential for conflict between the Federal laws forbidding the use of telecommunications to spread “suicide-related materials” and the laws in Victoria and Western Australia which have legalised forms of voluntary assisted dying. The column argues that the effect of the State laws is to differentiate the legal forms of voluntary assisted dying from suicide and assisted suicide, with the effect that Federal prohibitions do not apply to telecommunications between health practitioners and their patients regarding voluntary assisted dying.

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FAMILY AND CHILDREN’S HEALTH LAW ISSUES – *Editor: Ian Freckelton QC*

COVID-19 and Family Law Decision-Making – *Ian Freckelton QC*

All aspects of family law have been affected by the COVID-19 pandemic. It has posed challenges for the operation of the Family Court of Australia and the Federal Circuit Court, the obtaining of expert reports, the conduct of hearings, the functioning of contact centres, and the mode of delivery of children’s schooling. In Australia and in Ontario an attempt has been made to be clear about what is expected of parents during the period of crisis. An

Australian innovation has been the establishment of a COVID-19 List and communication by the Chief Justice of the Family Court about what is expected of parents by way of compliance with orders from chief health officers and safe practices to protect children against infection, especially those with particular health vulnerabilities. This column reviews such initiatives and a number of the significant family law decisions during the early phase of Australia's response to the COVID-19 pandemic. 846

ARTICLES

Legal Implications of Personal Protective Equipment Use When Treating Patients for COVID-19 (SARS-CoV-2) – Danuta Mendelson, Michael Keane, Mirko Bagaric and Cameron Graydon

Front-line health care personnel, including anaesthetists, otolaryngologists, and other health professionals dealing with acute cases of coronavirus, face a high risk of infection and thus mortality. The scientific evidence establishes that to protect them, hospital protocols should require that wearing of the highest levels of personal protective equipment (PPE) be available for doctors and nurses performing aerosol-generating procedures, such as intubation, sputum induction, open suctioning of airways, bronchoscopy, etc. of COVID-19 patients. Although several international bodies have issued recommendations for a very high-level PPE to be used when these procedures are undertaken, the current PPE guidelines in Australia have tended to be more relaxed, and hospital authorities relying on them might not comply with legal obligations to their employee health care workers. Failure to provide high-level PPE in many hospitals is of concern for a large number of health care workers; this article examines the scientific literature on the topic and provides a legal perspective on hospital authorities' possible liability in negligence. 856

Compassion, Law and COVID-19 – Nigel Stobbs, Belinda Bennett and Ian Freckelton QC

Levels of personal anxiety are inevitably escalating in response to the COVID-19 pandemic, including individual fear of infection, grief at the loss of loved ones and reactive depression related to loss of employment and livelihood. This article considers the importance of compassion in a range of contemporary and emerging contexts during a time of pandemic. These include: exposure of medical and care professionals to the acute demands of overstretched institutions resulting in adverse mental health outcomes and compassion fatigue; attitudes towards the burgeoning cohort of welfare recipients; and particularly vulnerable groups such as the elderly, and those who are homeless. The article considers how we ought to conceive of compassion in these contexts and makes some suggestions for building future compassion interventions and training. 865

Violation Liability in the Context of the Spread of COVID-19: Russian Experience – Svetlana I Pospelova, Yulia V Pavlova, Natalia A Kamenskaya and Sergey V Pospelov

The article investigates the legal regime of restrictive measures introduced in Russia due to the COVID-19 pandemic and provides statistical data on the spread of the infection. It describes special administrative violations and criminal offences first introduced during the pandemic: violation of therapeutic and epidemiological rules, dissemination of false information, and failure to follow the procedures introduced during the high-alert regime. Judicial and investigative practice is analysed. The most frequent violations of the legislation establishing requirements and restrictions to organisations and individuals during the spread of the new coronavirus infection are identified and issues of classification and differentiation of administrative and criminal liability for violation of sanitary and epidemiological rules and dissemination of false information about COVID-19 are addressed. Judgments by the Russian Supreme Court ensuring a uniform approach to court cases in all Russian regions are analysed. 877

International Access to Public Health Data: An Important Brazilian Legal Precedent
– *Ian Freckelton QC and Vera Lúcia Raposo*

Accurate, up-to-date data are the bedrock of effective public health responses, including in the context of the suffering caused by COVID-19. Any action to inhibit the compilation of such data has ramifications locally, nationally and internationally, and risks impairing the global capacity to respond to the virus. This article contextualises the decision of the government of President Bolsonaro of Brazil to reduce the accessibility of contemporary data about COVID-19 infections in Brazil within his views about, and responses to, the virus. It identifies the nature of actions taken to suppress such data by the Brazilian Ministry of Health and then scrutinises a decision by De Moraes J of Brazil’s High Court in *Sustainability Network v The President of the Republic of Brazil* (ADPF 690 MC/DF, 8 June 2020), which quashed the attempted suppression of public health data. The article hails the decision as an important public health law precedent. 895

Access to Health and Medical Research: Lessons from the COVID-19 Pandemic –
Faith O Aboyeji

The outbreak of COVID-19 in China and the resulting global pandemic have necessitated vigorous research into how this new virus works, how it can be cured and prevented, what kind of vaccine will work, and various other issues. To facilitate this research and enable quick scientific progress, rapid and immediate knowledge sharing among researchers globally became essential, including access to existing and new coronavirus-related research publications. This article discusses international responses to the need for immediate and rapid access to global health and medical research to combat the COVID-19 pandemic, and demonstrates how the exercise of copyright control restricts widespread access to knowledge, especially when published in journals. Ultimately, it recommends open access publishing as an effective way of circumventing copyright restrictions on health and medical research. 901

Have Indian Surrogates Been Harmed by Commercial Surrogacy Transactions? –
Donna Cooper and Philippa Trowse

Draft legislation has been approved by the Union Cabinet in India seeking to limit surrogacy to altruistic arrangements with intended parents who are either Indian citizens or couples residing outside the country but of Indian origin. This follows longstanding debates as to whether commercial surrogacy should be permitted. The primary argument against such arrangements has been the potential to exploit and cause harm to surrogate women. There is considerable literature on the exploitation debate, but little has been written about whether these transactions cause harm to surrogate women. Our article addresses this gap in the literature and develops a three-step framework using Mill’s harm principle through which to assess whether harm has occurred. We apply this framework to a sample of women who provided surrogacy services in India between 2006 and 2015, the period just before the government moved to ban overseas couples from accessing commercial surrogacy. 914

Regulation of the Abortion Drug RU 486: The Collision of Politics, Ethics and Morals in Australia – *Nicola Bodor*

The abortion drug RU 486 is widely available across the developed world, and its benefits and efficacy for women have been well established over the 40 years since its development. However, access to RU 486 for women in Australia has been a vexed issue since the mid-1990s. Because of pro-life politics under the Howard Government, importation of the drug into Australia was severely hampered, resulting in Australia lagging behind the rest of the developed world in access to medical abortions. This article highlights the history of RU 486, the current state of abortion laws in Australia and the issues that the politics

of the 1990s still cause for Australian women who seek a medical abortion (especially those living remotely). Finally, it proposes some options that could alleviate some of the difficulties faced by those who seek access to RU 486. 928

Vox populi, vox Dei? Previewing New Zealand’s Public Decision on Assisted Dying – Jessica Young and Andrew Geddis

In November of 2019, New Zealand’s Parliament enacted the *End of Life Choice Act 2019* (NZ) to authorise the administration of a lethal dose of medication to competent adults suffering from a terminal illness likely to end his or her life within six months, should they directly and voluntarily request it. However, before this legislation can enter into force, it must be approved by a majority of voters at a referendum held at the next general election. This article traces how the *End of Life Choice Act 2019* came to be enacted and examines the existing data on public opinion in order to provide a cautious prediction as to that referendum vote’s likely result. 937

Doctors and the Voluntary Assisted Dying Act 2017 (Vic): Knowledge and General Perspectives – Jodhi Rutherford

The purpose of this article is to report some Victorian doctors’ general perspectives and knowledge of the new *Voluntary Assisted Dying Act 2017* (Vic) (VAD Act). Under the VAD Act, doctors are constructed as the only legal providers of VAD in Victoria. Doctors who are unwilling to participate in VAD therefore constitute a barrier to patient access. This article reports the findings of a small empirical study into how some Victorian doctors with no in-principle objection towards the legalisation of VAD, are orientating themselves towards the law. It also explores participants’ understanding of the specific role required of doctors under the law. It finds that participants equate their support for the Act with biomedical ethical principles and generally hold a level of knowledge of the law which is not comprehensive but improves with greater exposure to VAD applications. This study serves as a temperature check of this key stakeholder group’s perspectives on the VAD Act in the first eight months of its operation. 952

Legal Liability Arising from the Use of “Agent Orange” in the Kimberley: Registration of 2,4,5-T and 2,4-D in Australia – Amne Alrifai

Between 1975 and 1985, the chemicals that make up Agent Orange were used by the Western Australian government in weed-spraying programs across the Kimberley region. A majority of weed-sprayers hired by the government were Aboriginal and worked without personal protective equipment. A large number of former sprayers have died or deal with negative health consequences as a result, yet few sprayers have ever been compensated. This article explores alternative mechanisms for compensating the former sprayers and their families through a two-part question: (1) how were 2,4-dichlorophenoxyacetic acid and 2,4,5-tri-chloro-phenoxy-acetic acid made available for use by Commonwealth and State governments; and (2) were government bodies negligent in allowing the use of these chemicals? 967

Support Systems for Medical Decision-Making: Considerations for Japan – Yoshihiko Iijima

Clinical issues involving ethical dilemmas arise daily and confound physicians as they provide medical care. These dilemmas require difficult decisions as physicians must respect patients’ values, lifestyles, and freedom of choice while protecting life and promoting health. This is made more challenging as values and lifestyles become more diverse, making third-party support necessary to accommodate the wishes of stakeholders, particularly patients. Collaborative work is important for addressing clinical ethics issues. Government

agencies and professional organisations should discuss individual cases as public policy concerns and release guidelines based on their deliberations. Medical institutions should refer to such guidelines in their own discussions on ethically challenging cases. This is not the case today as each organisation creates its own guidelines; there is no consensus on how clinical ethics committees or consultations should be conducted. Support systems that are public in nature are needed to protect patients’ rights and freedoms in medical care. 981

Corrective Justice and the Law Relating to Damages for Negligently Inflicted Psychiatric Injury: A Principled Explanation for the “Close and Loving Relationship” Consideration – *Martin Allcock*

The duty of care in cases of negligently inflicted psychiatric injury has long been limited using a number of mechanisms, all with the intention of ensuring that the ambit of liability remains within manageable bounds. These limiting mechanisms, now known in Australia as “considerations” relevant to an overriding test of reasonable foreseeability, have commonly been criticised as lacking in principled foundations, leading to a number of calls for their abandonment. This article extends these arguments, contending that the court’s consideration of whether the plaintiff and a person seriously injured or killed were in a close and loving relationship can also be understood on normative grounds. In particular, the court’s consideration of this factor can be regarded as principled from the perspective of Aristotelian corrective justice. 985

Recency of Practice and the Maintenance of Professional Competence for Nurses and Midwives: A Scoping Review Protocol – *Casey Marnie, Micah DJ Peters, Deborah Forsythe, Kate Kennedy, Greg Sharplin, Marion Eckert, Mary Chiarella and Rachael Vernon*

Australian and international nursing regulators have specific requirements for continuing competence and the professional, safe practice of nurses and midwives. Requirements can dictate duration of practice, time away from/recency of practice, revalidation policies, and time between study program completion and practice commencement. Requirements vary between contexts and are periodically updated. To identify and examine Australian and international evidence for best regulatory practices relating to recency and the maintenance of professional competence among nurses and midwives, a scoping review based on the Preferred Reporting Items for Systematic Reviews and Meta-Analyses extension for Scoping Reviews will be undertaken. This protocol details the scope, inclusion criteria, and methodology that will guide the scoping review, which will inform an update to the Nursing and Midwifery Board of Australia’s Registration Standard: Recency of Practice. 1008

Infanticide and Infanticide Statutes in Australia and New Zealand – *Russ Scott*

A major postpartum depression may develop insidiously and go untreated and represent a potentially serious hazard to the wellbeing of both the mother and her child or children. Infanticide is the term used to describe the deliberate act of a parent killing their own young child. The original *Infanticide Act 1922* of England and Wales applied to a woman who caused the death of her “newly born” child at the time when she had not fully recovered from the effect of giving birth to such child and by reason thereof “the balance of her mind was disturbed”. The subsequent *Infanticide Act 1938* (1 & 2 Geo 6, c 36) provided that the victim child could be any age up to 12 months. After reviewing the phenomenology of postpartum depression, maternal child murder (infanticide and filicide) and post-traumatic stress disorder, this article examines the recommendations of various law reform commissions and the development of infanticide statutes in Australia and New Zealand. The article compares and contrasts the different provisions and concludes with some recommendations for law reform. 1014

Public Health versus Alcohol Industry Compliance Laws: A Case of Industry Capture?

– *Tony Brown*

This article confirms that industry compliance and enforcement processes are an essential consideration in the growing pantheon of legal and commercial determinants of public health. While alcohol control laws vary between individual jurisdictions, their development and application are confronted by a common threat of undue industry influence or capture. This necessitates a greater understanding of this phenomenon to better inform a collective and effective international public health response. New South Wales, Australia, has developed a layer of alcohol industry compliance laws in the form of disciplinary schemes. This article critically explicates the first of these, the Violent Venues Scheme (VVS), to determine the nature and extent of any capture. This would significantly compromise harm minimisation statutory objects and disrupt the democratic process and the rule of law. In contrast, an influential industry identity, attributed the earlier last drinks laws, VVS and a related scheme as causing the alleged destruction of Sydney’s nighttime economy and fun. The research also analyses the indispensable role of a neoliberal paradigm in legitimising exclusive relationships between governments and industry. This is indelibly imprinted on the alcohol regulatory landscape. 1047

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