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EDITORIAL

Mandatory Vaccination Tensions and Litigation – *Ian Freckelton AO QC*

Community attitudes towards mandated vaccinations against COVID-19 vary significantly from country to country. Views on the issue are strongly held. However, in Australia opposition to vaccination is at low levels according to a leading public opinion poll, although there has been vocal opposition to "no jab, no work" directives from some. There is relative consistency in the framing of directives that designated categories of workers across a number of Australian States are required to be vaccinated to continue in their employment, especially in the health care sector. A number of challenges against such directives have been commenced in five States in Australia. However, decisions from the Fair Work Commission, the Queensland Industrial Relations Commission and the New South Wales Supreme Court have given a clear indication that in most scenarios such directives are likely to be found lawful, with precedence being given to the public health rights of the community over individual assertions of rights, in the difficult circumstances of a country still emerging from the COVID-19 pandemic, at a time when numbers of infections in New South Wales, the Australian Capital Territory and Victoria remain significant, and when Australia has not yet opened up to the world. 913

LEGAL ISSUES – *Editor: Joanna Manning*

Children, Parents, Courts and Medical Treatment: Now Who Decides? – *Joanna Manning*

This paper analyses three decisions by different High Courts (England and Wales) concerning the competence of children and adolescents to consent to medical treatment. In *Re X (No 2)* Munby J upheld two decisions from the early 1990s (*Re R* and *Re W*), in which the Court of Appeal held that a court has inherent power to override a Gillick-competent child's refusal of consent to a medical treatment. The second and third decisions concerned puberty blockers (PBs) for gender dysphoria. In *Bell*, the Full Court considered these "experimental" and "controversial" treatments with potentially lifelong implications, such that it was doubtful that a child under 16 could understand and weigh their long-term risks and consequences and thus be competent to give a legally valid consent to treatment with them. In *AB v CD* the Court held that parents nevertheless retained the ability to consent to PBs if the child could or did not do so. *Bell* is subject to appeal. If successful, a court could revisit the interrelationship between the respective legal decision-making powers of Gillick-competent minors, their parents, clinicians, and courts. 931

MEDICAL ISSUES – *Editor: Mike O'Connor*

Doulas from Cradle to Grave: Integration into Conventional Medical Care – *Mike O'Connor*

Doulas are becoming increasingly popular as support persons for the critical processes of birth and death. There is some evidence that their support reduces interventions such as Caesarean sections and instrumental deliveries as well as medicated pain relief. However,

there are clear tensions in Australia between doulas and the professional obstetric staff such as midwives and obstetricians, especially if they challenge proposed obstetric management on behalf of parturient women. Their role in managing the dying may also be open to malfeasance. At present Australian doulas are not regulated by the Australian Health Professionals Regulation Authority (AHPRA) but there is a need for them to be regulated at a local and State or Territory level. 946

BIOETHICAL ISSUES – *Editor: Julian Savulescu*

Assessing Rationing Decisions through the Principle of Proportionality – *James Cameron, Cameron Stewart and Julian Savulescu*

Rationing policies necessarily discriminate, as they must identify bases on which to discriminate between patients in order to prioritise. Treatments may provide a greater benefit to some people than others and this may be a morally relevant difference that justifies discrimination. But it is difficult to identify when a reduced capacity to benefit from treatment is a sufficient basis deny a person access to treatment. We argue that a clearer test is required to hold governments to account. Discriminatory policies should be assessed by incorporating the principle of utility into the proportionality test. This would mean that discriminatory policies could only be justified if the benefit to the community in discriminating outweighed the cost to the individual of being discriminated against. 955

NURSING AND MIDWIFERY ISSUES – *Editor: Mary Chiarella*

Law, Regulation or Just Damned Politics: The Under-utilisation and Undervaluing of the World's Largest Health Workforce – *Jill White AM*

This article analyses the outcomes of a three-year campaign to raise the status and profile of nursing – The Nursing Now Campaign. The Campaign aim was to take forward the recommendations of the Triple Impact Report of the United Kingdom All-Party Parliamentary Group (APPG) on Global Health. The Triple Impact Report documented the undervaluing and under-utilisation of nursing which is the largest health workforce globally and which the APPG believed had the greatest potential to have a positive impact upon the United Nations move to universal health coverage. The framework for analysis is that of Shiffman et al which was developed to explain the emergence and effectiveness of global networks, and is used here to examine the effectiveness of the Nursing Now Campaign against its stated aims. 965

HEALTH LAW REPORTER – *Editor: Cameron Stewart*

The Public Interest Test in Immediate Action Hearings under the Health Practitioner Regulation National Law – *Cameron Stewart and Christopher Rudge*

This paper examines the public interest test and how it is employed in immediate action hearings under the Health Practitioner Regulation National Law. It examines the history of the test in New South Wales and its eventual adoption by other States and Territories. The paper then examines recent cases from across Australia to highlight differences of approach in the formulation and application of public interest in immediate action hearings. The section concludes with some reflections on whether further reforms are needed to clarify and improve the application of the test. 976

ARTICLES

A Panacea for Australia's COVID-19 Crisis? Weighing Some Legal Implications of Mandatory Vaccination – *Gabrielle Wolf, Jason Taliadoros and Penny Gleeson*

Although Australia's rates of infection, illness and mortality from COVID-19 have been relatively low, they have escalated with the rapid transmission of the Delta variant. Restrictions imposed on people's liberties to curb the spread of the virus in several Australian States have engendered economic hardship, mental health challenges, and collective exhaustion and impatience. Several vaccines have been developed and approved for use in Australia that have proven effective in reducing the likelihood that the vaccinated will contract COVID-19 and, if infected, transmit and suffer serious illness and/or die from it. Public debate has thus centred on whether mandatory vaccination could be the panacea for Australia's COVID-19 crisis, and several Australian governments and employers have already imposed vaccination requirements. This article explores some potentially significant implications of mandatory vaccination for two areas of the law – human rights and employers' liability – to consider whether, from a legal perspective, mandatory vaccination could constitute a viable solution to Australia's present predicament. 993

Access to Maternal Health Care for Indigenous Australians under International Law – *Georgia Carniato*

Health disparities for Indigenous Australians when compared to non-Indigenous Australians are a consequence of colonial policies which have applied a Westernised biomedical view on health, often ignoring the spiritual and cultural aspects that are crucial to Indigenous health. This disparity has also manifested in maternal health care for Indigenous women, which leads to poorer health outcomes for women and their babies. This article reveals that there are many areas of current Australian legislation and policy which violate Australia's obligations under international law in the right to health. There are inherent power structures that are contained within judgments of law and policy which have dominated the development of international law and domestic law as it relates to vulnerable groups. Finally, a better engagement in bi-cultural partnerships in policy and cultural competency training can better the health outcomes in maternal health care. 1018

Involuntary Patient Assessment in Australia: A Mental Health or Public Health Response? – *Simon Llewellyn, Dominique Moritz, Marc Broadbent and Chiung-Jung (Jo) Wu AM*

Involuntary assessment relates to detaining and transporting a person at risk of harming themselves or others, and without their consent, to hospital for examination and treatment. State and Territory statutory authorities generally allow police, paramedics and/or health practitioners to initiate involuntary assessment. Because of the stigma attached to mental illness, and to protect people from harming themselves or others in broader circumstances than mental illness alone, the Queensland government changed involuntary assessment powers. Instead of mental health legislation governing involuntary assessment in Queensland, this is now a public health function. Despite the best intentions, the public health legislation does not address some of the practical challenges of involuntary assessment for health practitioners. This article explores the evolution of involuntary assessment powers in Australia and considers the impacts of it becoming a public health power in Queensland. 1035

Data, Temporary Monopolies and Biosimilar Development – *Teddy Henriksen*

Biosimilars facilitate access to the lifesaving and life-changing effects of biologics through reduced prices. Against the increasing uptake of biosimilars in coming years it is important to consider some of the regulatory levers governments use to promote biosimilar uptake and use. Data exclusivity is one of these levers. This article shows that data exclusivity is essential to biosimilar development and therefore should be viewed as a right given to biosimilar manufacturers rather than as it is usually framed: a right given to originator biologic manufacturers. Without the benefit of data exclusivity biosimilars would be forced to complete full clinical trials on a pharmaceutical molecule that regulators have determined to be demonstrably similar to an already marketed pharmaceutical in terms of safety and efficacy. As well as exposing the biosimilar manufacturer to significant time delays and extra cost, this would raise serious moral and ethical questions with respect to duplication of clinical trials. 1048

Co-opting Laws to Influence Prevailing Medical and Legal Thinking: "Off-Label" Conceptual Use of One-Punch Laws and Boxing – *Joseph Lee*

The law shapes the disposition and actions of persons, and what is acceptable and ethical in a community. However, laws in society can potentially be co-opted to influence medical and legal thought in other areas, using an "off-label" conceptual interpretation. For example, medical authorities have recognised the dangers of blows to the head in boxing, with some being fatal. Elsewhere, recent criminal law target assaults causing death by one punch. These laws, alongside coronial inquests, can be helpful in shifting the outlook on boxing, its risks, and fatalities. The cause of both forms of deaths usually involves traumatic brain injuries. This article analyses the contexts surrounding one-punch laws, and some legal proceedings and coroners' inquests, to seek alternative perspectives and the medical and ethical implications of such laws. The discussions also refer to legislation, and socio-legal and medical ethics debates in the United Kingdom, Europe, and the United States. 1066

Legal Issues in Life-Limiting Illness: Can Cross-Agency, Interprofessional Education Support Integration of Care? – *Colette Hawkins, Charlotte Rothwell, Helen Close, Charlotte Emmett and Hannah Hesselgreaves*

Legal issues are prevalent in life-limiting illness, relating to social welfare needs as well as delivery of legally compliant care. Yet the broad range of agencies delivering care is fragmented, risking unmet needs. This mixed-methods research explored the potential of cross-agency, interprofessional education to raise awareness and understanding of legal needs in this context and promote closer service integration. Four identical workshops, run in north-east England, brought together 99 participants from health, social, legal, advice, charitable, public and private sectors. Participants were overwhelmingly positive about the value of learning together with 97% wanting more sessions. Learning priorities included greater awareness of services and referral routes as well as areas of law relating to advance care planning and mental capacity. Interprofessional education, spanning the breadth of relevant agencies and supported by national strategy, was identified as a route to integrating services. 1082

Under the Influence: Regulating Influencers Giving Nutrition Advice – *Marilyn Bromberg and Laura Fitzgerald*

Influencers are ordinary people or celebrities who post regularly about their daily lives on social media and have a significant number of followers. They are normally provided with free products or services and are paid to post and tag photographs of the services or products on social media. Studies have found that some influencers provide advice

concerning nutrition that is incorrect or could harm people if followed. *The Australian Food and Beverages Advertising Code* and the *Australian Consumer Law* are relevant regulatory mechanisms that apply to this situation. However, there are some serious gaps within this framework and it is not being sufficiently implemented. The authors argue that there is currently insufficient protection to the public from influencers providing misleading or deceptive nutrition advice and the consequences are serious to the public's health. This is the first article, to the authors' knowledge, to examine this issue in Australia. 1092

Starvation Genocide in Occupied Eastern Europe 1939–1945: Food Confiscation by and for the Nazis – *George M Weisz*

The genocide effected by the Nazi regime during World War II, intended for the local population in Eastern Europe, took the form of allocation of daily food rations: 100% for the Germans; 70% for the Poles; 30% for Greeks; 20% for Jews. Hermann Göring, the Reichsmarschall of the Nazi Empire created a blueprint for full alimentation of the occupying German forces through theft of land and food of the Soviet Union thus forcing its "racially inferior" population to starve, adopted on 29 April 1941. In the weeks leading to the German invasion of the Soviet Union in June 1941, the Reich Minister for Food, Richard Darré, and his State Secretary, Herbert Backe, developed the "Hunger Plan", which led to death by starvation of at least seven million Soviet civilians, Jews and gentiles. This article reviews responsibility for the formulation and implementation of this form of genocide. 1105

"Loss of Dignity" in Claims for Damages for "Humiliation, Loss of Dignity and Injury to Feelings" in the Human Rights Review Tribunal of New Zealand – *Iris Reuvecamp*

The Human Rights Review Tribunal of New Zealand recently determined that it has the power to award damages for loss of dignity in cases where the person whose rights have been breached does not have the mental capacity to understand that this is the case, or the impact of that breach on their dignity. In defining the meaning of dignity, determining how to assess its loss (by way of an objective rather than subjective test) and categorising the nature of damages for loss of dignity as vindicatory rather than compensatory, the Tribunal broke new ground. However, after analysing the Tribunal's decision, and considering relevant case law, this article concludes that the Tribunal's decision was flawed, and that the legislation only allows for the award of compensatory damages. Legislative change would be required to expand the scope of remedies available to include vindicatory damages. 1114

Comprehensive Decriminalisation of Abortion: An Analysis of Concept, Arguments and Regulatory Frameworks – *Fien De Meyer*

In 2018–2019, the Belgian Parliament launched two legal initiatives that fundamentally challenge the role of criminal law in relation to the regulation of abortion. Similarly, some Australian jurisdictions and New Zealand have recently decriminalised abortion in all stages of pregnancy and instead approach it as a form of health care. In light of these developments, this article conceptualises "comprehensive decriminalisation" of abortion as the withdrawal of the regulation of abortion from criminal codes and statutes and the removal of specific criminal sanctions. Next, it examines the strengths and limits of the arguments for and against comprehensive decriminalisation and considers the potential impact of decriminalisation on abortion access and stigma. Finally, it illustrates the distinction between decriminalisation and deregulation by addressing the regulatory approaches of Australian jurisdictions, Belgium, Canada and New Zealand to late-term abortion in particular. 1127

Reproductive Rights: Foetal Rights or Female Freedoms? – *Tahnee De Souza and Henry Kha*

The article explores the tension between foetal rights and the gestational mother's rights, particularly the emergence of foetal rights cases in the laws of Australia, the United Kingdom and the United States, the legal philosophical tensions in the maternal–foetal relationship, and the moral dilemmas of foetal rights. The interests of the unborn child are raised in cases involving court-ordered caesarean sections and the legal personhood of the foetus. It is argued that the relevant factors to take into account in resolving the conundrum between the survivorship of the foetus and the gestational mother include determining the sentient status of the foetus and the degree of harm inflicted on the woman to rescue the foetus. 1142

The Right to Biological Truth versus Stability of the Family – *Vugar G Mammadov, Gediminas Sagatys and Roy G Beran*

This article reports on a 2019 Lithuanian case of disputed paternity. The judgment highlights the challenges of requiring deoxyribonucleic acid (DNA) testing of a family, where the infant is already part of an established family unit. The decision turned on the refusal of the putative parents to undergo imposed DNA testing. Ultimately, the Lithuanian Supreme Court (LSC) decided the matter according to the basis of the best interests of the child. 1154

BOOK REVIEW

Global Health Security: A Blueprint for the Future, by Lawrence O Gostin 1158

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