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EDITORIAL

Pandemics, Polycentricity and Public Perceptions: Lessons from the Djokovic Saga – *Ian Freckelton AO QC*

Since the early 1960s the analytical lens of polycentricity has provided an opportunity to understand complex systems and how they intersect in a variety of environments. With a contemporary origin in governance, regulation and political science scholarship, polycentricity analysis has focused on overlap and conflict in systems and the potential for reduction in effectiveness of service provision. This paper reviews contemporary thinking on polycentricity, including in the context of the COVID-19 pandemic. It instances the unfortunate events leading to the failed application for judicial review in the Full Court of the Federal Court of Australia by the tennis player, Novak Djokovic (*Djokovic v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2022] FCAFC 3) as an example of the efforts that need to be made in the midst of a public health crisis in the interests of community trust in government to ensure that there is co-ordination and consistency of messaging and decision-making. 9

BIOETHICAL ISSUES – *Editor: Julian Savulescu*

Ethical Issues in Commercialisation of Stem Cell Therapies: Mapping the Terrain – *Julian Koplin*

Bioethical debates on stem cell research have focused primarily on the moral status of human embryos. This article highlights seven distinct policy and ethical issues associated with the commercialisation of stem cell therapies, describes some of the underlying moral questions on which they turn, and argues that there is an urgent need to refocus the debate on stem cell research beyond the controversy over embryo destruction. 23

COMPLEMENTARY HEALTH ISSUES – *Editor: Ian Freckelton AO QC*

From then to Now: Regulatory Theory and Complementary and Alternative Medicine Practice in Australia – *Michael Weir*

This article deals with the nature of regulation by government and private institutions in Australia of the provision of health services in particular of complementary and alternative medicine (CAM). The primary questions considered are whether the current regulation of CAM practice in Australia is focused on the public interest and if it provides sound regulation based upon efficiency (greater competition in the health care market); and effectiveness (if it deals with regulatory gaps, protection of public health, flexibility, proportionality and parsimony). This article includes a historical review of the regulatory structure for CAM and an analysis of how it has developed over decades to a more mature position. 37

LEGAL ISSUES – *Editor: Malcolm Smith*

Transgender Minors and the Commencement of Hormone Treatment for Gender Dysphoria: Is Recent English Case Law Likely to Influence the Australian Legal Position? – *Malcolm Smith*

This article considers recent English case law addressing the issue of whether court approval is required for the commencement of hormone treatment for minors with Gender Dysphoria. In particular, the decision in *Bell v The Tavistock and Portman NHS Foundation Trust* [2021] EWCA Civ 1363 is considered for the purpose of both distinguishing the legal framework in England from the body of Australian law on this topic, as well as considering whether the case may potentially impact on Australian law moving forward. One important aspect of the Court of Appeal's decision in *Bell*, which overturned the lower court's decision, is that the case clarifies how the principle of *Gillick*-competency should be applied in this context. The Court of Appeal held that in line with the House of Lords' reasoning in *Gillick*, the assessment of a minor's capacity is for the relevant treating health care professional(s) to assess rather than judges. This interpretation may potentially impact on how this principle is applied in the Australian cases relevant to minors and Gender Dysphoria, particularly those that have required an application to court in circumstances where a minor's parent(s) disagree with the conclusion of a treating clinician who has assessed their child as *Gillick*-competent for the purpose of consenting to hormone treatment. 50

MENTAL HEALTH LAW ISSUES – *Editor: Bernadette McSherry*

Human Rights Law and the Defence of Mental Impairment – *Bernadette McSherry and Andrew Simon-Butler*

This article provides an overview of recent scholarship calling for the defence of mental impairment to be abolished on the grounds that it breaches international human rights law. It outlines how differing interpretations of the United Nations Convention on the Rights of Persons with Disabilities (CRPD) suggest that arguments for abolition will continue to be contested. On a practical level, no Australasian law reform body has called for the abolition of the defence and it seems unlikely that government policy will shift towards this in the absence of such a recommendation from these bodies. However, highlighting the obligations on States Parties to the CRPD to ensure the right to equal treatment before the law necessitates a careful consideration of whether the defence of mental impairment is still fit for purpose. 62

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

Needle and Syringe Programs in Prisons: Victoria's "Problematic" Policy Position – *Angus Paterson*

With high rates of blood-borne virus infection in Australian prisons, a needle and syringe program (NSP) stands ready to deliver similar benefits to its community counterpart. Supplying sterile injecting equipment and safe-use guidance in prisons could improve prisoner health outcomes and the safety of the corrections system. Yet, despite the protestations of public health experts and the recommendations of State, national, and international bodies, Australian States and Territories refuse to implement prison-based NSPs, with serious consequences for prisoner health. This article focuses on the Australian State of Victoria as a case study representative of other jurisdictions. Victoria's inaction is arguably in breach of international standards and the Victorian Charter of Human Rights

and Responsibilities, but less likely to constitute a breach of the common law duty of care. Undertaking a legal analysis of these areas, this article examines the potential of each area to support the case for reform of the Victorian Government's policy on a prison-based NSP. Looking ahead, this article suggests reforms to ensure the proper functioning and administration of prison NSPs. 67

ARTICLES

Protection, Prevention or Punishment? A Cross-Jurisdictional Analysis of Regulatory Immediate Action against Medical Practitioners – *Owen M Bradfield, Matthew J Spittal and Marie M Bismark*

Medical regulators protect the public from unsafe, unwell, or unscrupulous medical practitioners. To facilitate a swift response to serious allegations, many regulators are equipped with far-reaching emergency powers to immediately suspend, or impose conditions on, medical practitioners' registration before facts are proven. Failing to take urgent action may expose the public to ongoing avoidable harm and may erode public trust in the profession. Equally, imposing immediate action in response to allegations that are not subsequently proven can precipitously and irreparably injure a practitioner's career and emotional wellbeing. This is the second of two articles published in the *Journal of Law and Medicine* that explores the emerging jurisprudence in relation to these emergency regulatory powers. This article compares the approaches to immediate action in seven countries, providing insights for policy-makers and decision-makers into how modern regulatory frameworks attempt to balance the inherent tensions between the profession, the public and the State. 85

Criminal Convictions of Disciplined Health Practitioners in New Zealand – *Lois Surgenor, Kate Diesfeld, Marta Rychert, Olivia Kelly and Kate Kersey*

This study investigates the rates and types of criminal convictions encountered by New Zealand's Health Practitioners Disciplinary Tribunal (HPDT) over a 15-year period. Criminal convictions appeared in 24% ($n = 101$) of cases, with male practitioners ($p < 0.01$) and pharmacists ($p < 0.05$) being significantly over-represented. The most frequent types of convictions included crimes against rights of property (33.6%), sexual/morality/decency crimes (21.9%) and misuse of drugs (8.4%). Criminal behaviour settings were evenly split between personal and professional life for medical practitioners (56.5% professional life) and nurses (56.5% professional life) but disproportionately in professional life (85%) for pharmacists. Criminal conviction cases were significantly more likely to result in registration cancellation ($p < 0.001$) and practice suspensions ($p < 0.05$) when compared with non-criminal cases, although fewer fines were ordered ($p < 0.001$). Profession-specific risk factors, alongside how to rehabilitate members of the subgroup who may later seek to renew their practice are areas for further research, are discussed. 117

Voluntary Assisted Dying by Practitioner Administration Is Not Suicide: A Way Past the Commonwealth Criminal Code? – *Katrine Del Villar, Ben P White, Eliana Close and Lindy Willmott*

Five Australian States – Victoria, Western Australia, Tasmania, South Australia and Queensland – have now legalised voluntary assisted dying (VAD). These State legislative schemes intersect with provisions in the *Criminal Code Act 1995* (Cth) (*Commonwealth Criminal Code*) which prohibit using electronic communication to counsel, promote, or provide instruction on "suicide". These provisions may prevent some conversations and assessments relating to self-administration of VAD occurring via telehealth, thereby

restricting access for prospective VAD patients in regional and remote areas. However, as practitioner administration of VAD is not "suicide", the *Commonwealth Criminal Code* does not apply. The Commonwealth law creates the absurd result that the same conversation conducted via telehealth is illegal when contemplating VAD by self-administration, but legal when discussing practitioner-administered VAD. To avoid this, we advocate amending the Code to remove the inconsistency with state VAD laws. We also recommend State legislatures consider permitting greater access to VAD by practitioner-administered VAD. 129

Exploring the Adjudication of Methamphetamine-related Housing Contamination Cases in New Zealand – *Claudia Denisse Sanchez Lozano, Chris Wilkins and Marta Rychert*

Residential methamphetamine contamination in New Zealand has resulted in substantial clean-up costs and evictions. Disputes between tenants and landlords have been adjudicated by the New Zealand Tenancy Tribunal (NZTT). However, the adjudication processes applied are not covered in specific legislation, and scientific advice and related regulatory standards have evolved over time, leading to uncertainty about the consistency of decisions. This study explores the factors that have influenced adjudicators' decisions by thematically analysing 685 NZTT orders from 2014 to 2019. Landlords filed 84% of applications and tenants were deemed liable for 96% of the NZ$2.8 million damages awarded. The Tribunal's decisions were unevenly influenced by baseline testing, presence of children, experience of health issues, police intervention, and neighbours' reports. Several factors contributed to inconsistent decisions, including the contamination threshold applied, sampling methodology, establishing liability for contamination, and assessing "cleanliness". This study suggests more judicial guidance and legislation is required to resolve these cases more equitably. 142

Exploring Injured Persons' Experiences of Engaging and Using Lawyers in Road Traffic Injury Compensation Claims – *Clare E Scollay, Becky Batagol and Genevieve M Grant*

Legal services can play a critical role in facilitating claimant access to entitlements and shaping claimant experiences and outcomes in compensation settings. However, much remains unknown about claimants' goals in engaging legal services, experiences of using legal services, and satisfaction with legal advisers. Drawing on semi-structured interviews with claimants in the road traffic injury compensation scheme in the State of Victoria, Australia, this article identified that most claimants engaged legal services to access entitlements when they struggled to do so alone. Claimants often had little understanding of the activities performed by their lawyers: despite this, most viewed legal service use as valuable or worthwhile in terms of outcomes achieved. Claimants' experiences and levels of satisfaction were coloured by the quantity and quality of communication between themselves and their legal representatives. The findings highlight opportunities for schemes, lawyers, and legal profession regulators to increase the responsiveness of services to claimants' needs. 156

Bile Duct Injuries as a Result of Cholecystectomy: An Australian Perspective – *Arthur Richardson, Helen Pham and Michael Hollands*

Cholecystectomy remains the mainstay treatment for symptomatic gallstones. Despite the evolution of surgical techniques and approaches, bile duct injury represents a significant complication, even in experienced hands. It is associated with significant postoperative morbidity, resource utilisation and costs. Compared to the international data, there is a paucity of data on malpractice cases involving bile duct injuries (BDIs) proceeding to definitive judgment and defence. This article examines the surgical literature and the

case law in Australia as it relates to BDIs following cholecystectomy. This article aims to discuss the issues surrounding major bile duct injury litigation and compares the Australian perspective with international experience. 173

Fitness to Drive: A Smartphone Application for Doctors, Patients and the Driver Licensing Authority – *Grace S Went*

Medical fitness to drive in Victoria is currently governed by the Austroads Fitness to Drive Guidelines. Doctors are expected to review the 188-page document and advise patients in relation to their unique medical condition. Patients must then report themselves to the driver licensing authority if they are unfit to drive. Despite multiple recommendations from coroners, there is no mandatory reporting system in Victoria, as mandatory reporting is disliked by both doctors and patients. Research has shown that binary decision trees are more accurate than doctors in determining fitness to drive. This article proposes a phone application implementing yes-no decision trees for each condition in the guidelines to increase accuracy and documentation rates and protect doctors from liability. 191

Using Cumulative Impact Assessment as a Smokescreen in New South Wales Alcohol Harm Reduction Laws: A Commentary – *Alison Ziller and Tony Brown*

In 2020 the *New South Wales Liquor Act* was amended to allow the Independent Liquor and Gaming Authority (ILGA) to approve new liquor authorisations in parts of the Sydney CBD otherwise subject to a freeze. The vehicle for this was called Cumulative Impact Assessment (CIA). The Amendment added promotion of business vitality to an established list of considerations previously set out by ILGA in its Guideline (6) on social impact assessment. The strategy set out in a new Guideline (18) appears to use an impartial and objective methodology while advocating reliance on intangible criteria and selective use of data in order to increase applicant chances of success against a rebuttable presumption against approval. While CIA is an established method in other professional areas, its use in the amendment influenced by the industry risks exacerbating alcohol-related harm. 203

Born with a Plastic Spoon in Their Mouth? – Substitution, Interchangeability, and Marketing of Biosimilars – *Rhiannon Bandiera, Elizabeth Handsley and David Lim*

Biosimilar medicines have the potential to increase medicine access and bring cost savings to consumers, but uptake has been slow for a range of reasons. This article analyses one such reason, namely the potential for competitors' promotional materials to use certain terms with technical meanings, such as "interchangeable" and "substitution", in a misleading way. Against the backdrop of a flawed co-regulatory system for pharmaceutical marketing, the article identifies a need for clear regulatory statements about appropriate uses of such terms in pharmaceutical marketing and promotion. 208

In Vitro Fertilisation with Reception of Oocytes from Partner: A Transnational Case of Female Shared Biological Motherhood – *Matteo Gulino and Gianluca Montanari Vergallo*

The social evolution of the concept of "the family" and changes in attitudes towards homosexual couples have expanded the range of people permitted to gain access to assisted reproduction technologies, encouraging the creation of blended families. "Reception of Oocytes from Partner" (ROPA) is a treatment that permits female couples to become active participants in the reproductive process and have a biological connection to their child. This article reports a case of transnational shared motherhood, in which the Italian Supreme Court (Application no 19599, Supreme Court of Cassation, First Civil Chamber, 2016), dealt for the first time with a same-sex couple's request concerning the recognition of a legal child-relationship with a child conceived through in vitro fertilisation with ROPA.

Although Italian law bans assisted reproduction technologies for same-sex couples, the Court acceded to the request of the couple on the basis of its evaluation of what was in the best interests of the child. 224

Sweet and Sour: A Responsive Strategy to Strengthen Sugar-Sweetened Beverage Regulation in Australia – *Alexandra Finch*

This article proposes a responsive regulatory approach to reducing Australia's population consumption of sugar from sugar-sweetened beverages, which are a major source of free sugars in the diet and a notable contributor to Australia's burden of obesity-related disease. It focuses on reformulation and labelling initiatives; two of the core ways in which sugar-sweetened beverages are regulated for public health purposes in Australia (and globally). Pointing to poor industry participation, weak targets, and minimal enforcement mechanisms, this article argues that the current voluntary regulatory initiatives are significantly underperforming and are insufficient to achieve their stated public health objectives. In the absence of robust industry action, stronger regulation is required. Responsive regulation, which advocates for increasingly stringent sanctions and government control in response to industry failure, offers government a roadmap to strengthen existing voluntary initiatives in the interest of securing better population health outcomes. 231

Stigma, COVID and Health Status Related Discrimination under Nigeria Law – *Bankole Sodipo, Titilayo Aderibigbe and Daniel Ozoma*

Stigmatisation of a person often leads to a demeaning treatment of the person by the public. There is a growing stigma about COVID-19 resulting in denials by some persons that members of their family died of COVID. This portends danger to public health as data and information-sharing are important ways of curbing challenges to public health. Stigmatisation may result in treating persons with health challenges like COVID in a discriminatory manner. This article reviews the remedies available to persons who have been discriminated against on the grounds of their health condition. It examines the constitutionality of the powers to restrict movement and the like, made to address the COVID-19 pandemic. It suggests how health stigmatisation can be curbed. 245

An Evaluation within the Context of the Istanbul Protocol of the Medico-Legal Examinations of Turkish Detainees during the Recent State of Emergency in Turkey – *Alper Keten, Johannes Nicolakis, Ramazan Abacı and Aykut Lale*

The present study evaluates the reported medical examination procedures in Turkish detention facilities of Turkish detainees who sought asylum in Germany after their detention in Turkey and the present process of medico-legal reporting, to evaluate compliance with the principles of the Istanbul Protocol and to discuss the issue in the context of the literature. Fifty-one participants were asked questions related to the examination steps specified in the Istanbul Protocol. 61% of participants were examined in an inappropriate place according to Istanbul Protocol. 42 participants (82.3%) claimed they had been mistreated through beatings, improper application of handcuffs, being forced to stand up for a long time, lying on bare concrete floors, staying in confined spaces without fresh air, and psychological torture. The answers given by the participants revealed that not all medical examinations conducted by the Turkish authorities during the detention were carried out in accordance with the Istanbul Protocol. 254

What to Do in the Next Pandemic Outbreak: Natural Herd Immunity Versus Lockdown (Lessons Learned from COVID-19) – *Vera Lúcia Raposo*

The purpose of this article is to analyse non-pharmaceutical approaches to control pandemics. Currently vaccines are our best hope to control the COVID-19 pandemic, but before the appearance of the first vaccines the available possibilities were much more limited. While most people worldwide were confined to their homes to slow the spread of the new coronavirus, some countries (most notably the United Kingdom) advocated infecting the majority of the community, aiming to achieve what has been called "herd immunity". This article focuses on two non-therapeutic strategies for dealing with deadly viruses and points out their respective problems: natural herd immunity and quarantines/lockdowns. It analyses these strategies from three perspectives: legal, ethical and social. The article concludes that in the absence of therapeutic alternatives (vaccines), short-term lockdowns are necessary, but long-term lockdowns are legally, ethically, socially and financially impossible to sustain. 260

Challenging the Myth That the Sexually Abused Female Child Must Have Genital Injuries – *Maryanne Lobo, Jennifer AS Smith and John AM Gall*

This article aims to define and describe female genital anatomy, the changes that occur in the genitalia during growth and puberty, and during sexual response and intercourse. It elaborates the reasons for normal genital examination findings in most female children who have been sexually abused and explains why the absence of findings of genital trauma should not be used to challenge the credibility of the child's history of sexual abuse. 270

Is It Time for Australia to Reassess Its Legislation on Human Embryo Experimentation? – *Francis J O'Keeffe, Margaret Somerville and George L Mendz*

The United Kingdom Warnock Committee (1984) was a landmark contributor to the ethics and law governing human embryo experimentation. It recommended a time limit up to 14 days of development after fertilisation within which such experimentation may take place, which mirrors the late 1970s' proposal of the United States Department of Health, Education, and Welfare Ethics Advisory Board (EAB). This study analyses the EAB's and the Warnock Committee's reasoning and conclusions regarding what constitutes ethical behaviour towards the human embryo. Current embryology and recently created embryo-like structures are considered. After the Warnock Report, several Australian Federal and State committees in Australia investigated the ethics which should guide experimentation on human embryos. The reports of these Australian committees are reviewed and the potential influence of both earlier committees on their deliberations is discussed. The rationale informing current Australian law governing human embryo experimentation is examined. Considering current more advanced knowledge of embryology, it is concluded that this legislation should be reassessed. 279

BOOK REVIEW

Personal Effects, by RA Jensen with J Hider, St Martin's Press 297