FOREWORD

THE HON JUSTICE ROBERT BEECH-JONES*

The apt title of the thematic section of this edition of the *University of New South Wales Law Journal* is 'Life Sciences: Ethics, Innovation and the Future of Law'. The fixing of one theme for five of the articles caused me to try and identify common ideas stretching across all 10. This was probably a futile task because the undoubted strength of this edition is the diversity of the subject matter (along with the quality of the articles). My meandering fixed on three broad topics: technology (nano, gene, human research ethics, and technological intrusion on personal life), regulation (nano, gene, human research ethics, and charities) and equality (animal rights, opposition to vaccine mandates, sexual assault victims, Indigenous offenders, and queer rights). 'Technology', 'regulatory and 'equality' does not exactly roll off the tongue like 'liberty, equality and fraternity' but it was the best I could do. It imperfectly encompasses the overall idea that future challenges are the life blood of the various articles.

What is also striking about the articles is that, to a large extent, they are the antithesis of the doctrinal analysis of case law that were almost uniform in my time at law school. Instead, almost all of these articles are based on empirical data obtained by the authors and their colleagues over many arduous weeks and months, or perhaps longer. One of the articles reviewed a vast number of sentencing judgments of a particular court not for the purpose of identifying the underlying legal principles applied by that court, but to determine at a factual level the degree of engagement with an individual offender's circumstances.[1]

On the broad technology and regulation theme, the article by Paris Jeffcoat, Cary Di Lernia and Elizabeth New, 'Letting the Market Decide? The Rise – and Regulatory Risks – of the Australian Nanotechnology Industry', is a full-throated examination of the current state of safety regulation of so much of the nanotechnology industry that concerns what can be best described as food additives. The authors contend that, despite large government and private sector investment in nanotechnology, there has been underinvestment in the regulatory scheme monitoring the safety of its uses. The specific focus of the article is the approach of Food Standards Australia New Zealand and the regulatory framework in which it operates. The authors are critical of both, especially the reliance on 'grandfather' provisions that permit the introduction of products with nano versions of existing

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1 Anthony Hopkins et al, 'Indigenous Experience Reports: Addressing Silence and Deficit Discourse in Sentencing' (2023) 46(2) *University of New South Wales Law Journal* 615.

substances onto the market without a further safety evaluation. They advocate various measures to address the deficiencies they identify, including enhanced product labelling requirements that mandate an explicit declaration of the presence of nano objects at an ingredient level accompanied by an education campaign to enhance informed consumer choice. They also advance the idea of an autonomous regulatory body dedicated to researching and regulating the use of nanotechnology.

Implicit in the authors' proposals for reform is that there is not currently much public understanding about the uses of nanotechnology and its potential associated risks. As the COVID-19 pandemic has taught us, risks to public health can be better managed when the public has been educated about what to expect.

To those of us immersed in crime, Callum Vittali-Smith's article, 'To Catch a Killer Cousin: Investigative Genetic Genealogy as a Critical Extension of Familial Searching in Crime Convictions in Australia', is a ripping yarn. The article traces the use of so-called familial searching in DNA databases for part matches with suspects in criminal investigations. If a part match can be derived, then the investigators zero in on a close relative as a suspect, usually by surreptitiously obtaining their DNA from a discarded drink bottle or cigarette and then (hopefully) obtaining a full match. The expansion of DNA databases comprised of samples taken from those who have been convicted of previous crimes has seen this technique expand overseas. It has only been used here in isolated cases but with spectacular results.

So, what's the problem? The author points to various forms of unfairness associated with the use of familial DNA, including using one person's DNA to implicate a close relative without the donor's consent, the consequential recriminations that ensue within the family and the significant racial bias in the persons caught by this technique, especially Indigenous Australians who are likely to be vastly overrepresented in the DNA databases. This might be the price to pay for the successful detection of the perpetrators of serious crimes, however the author postulates a fairer and more comprehensive technique, namely, Investigative Genetic Genealogy ('IGG'). With IGG, the closeness of the connection between the donor and perpetrator can be as remote as third or fourth cousins. This allows for a large pool of potential suspects to be ascertained with traditional genealogical and investigative methods then used to identify the suspect. When this approach is combined with both criminal and genealogical databases, it would allow almost 90% of European descended adults to be identified through IGG. This would remove the racial bias component of the technique and potential problem of one close relative becoming a 'genetic informant' on another.

IGG has a lot to commend it and it seems worthy of consideration by law enforcement. As recent events in Queensland suggest, and as first-hand experience with delays in DNA testing results confirms, there are significant resource constraints upon forensic laboratories. This is regrettable because the development of well-funded, expeditious and rigorous DNA testing, along with equally well-funded oversight systems that detect and avoid miscarriages, will avoid much greater costs for the criminal justice system and the community in the long-term.

A different regulatory scheme is put under the microscope in 'Reversing the "Quasi-tribunal" Role of Human Research Ethics Committees: A Waiver of Consent Case Study' by Lisa Eckstein et al. As their name implies, Human Research Ethics

Committees ('HRECs') were originally envisaged as an institutionally-based peer review system designed to determine the ethical acceptability of research proposals. The authors trace recent legislative and practical developments which have effectively resulted in HRECs undertaking 'privacy policing' and determining issues such as whether it is impractical for one set of researchers to use data collected by a previous set of researchers where the participants' consent did not expressly extend to the further use proposed. The principal legislative basis for this activity appears to be guidelines promulgated under section 95 of the *Privacy Act 1988* (Cth), the substance of which means that if a HREC determines that a particular medical use of private data conforms with the guidelines, then that use will not breach the Act.

Most of the concerns raised about the process echo the common complaints made about various forms of administrative action such as a lack of transparent reasons, consistency in decision-making and effective appeal or review rights. The most persuasive suggestion is for greater patient and public engagement in the approval of applications to waive consent requirements. It may be impossible or impracticable to obtain individual consent for a new use from all those who supplied data in the past, but that does not mean that no effort should be made to even *consult* with at least some of those who did or their representatives.

The premise of Rosemary Langford and Malcolm Anderson's article, 'Restoring Public Trust in Charities: Empirical Findings and Recommendations', is that the complexities and inconsistencies between the multiple sources of governance duties imposed on directors and officers of charities is not conducive to good governance overall.[2] The authors tested their thesis by what appears to have been a comprehensive and well-crafted survey administered to directors and officers of charities designed to tease out their awareness of governance duties and whether they are applied in practice. The overall result is encouraging. There appears to be a relatively high cognisance of the duty to avoid conflicts of interest, to avoid conflicts between interest and to make decisions in the overall interests of the charity. There was less clarity on how conflicts are managed but nothing that raised alarm bells.

To this upbeat analysis, two elements of caution must be introduced. First, for entirely understandable reasons, the response rate to the survey could not be accurately gauged so an element of response bias could have crept in. I suspect that those who were most likely to respond to the survey are more likely to be cognisant of the governance issues being addressed by the survey. Second, as the authors acknowledge, the charity sector is critically dependent on the maintenance of public trust. Governance lapses in one large charity or a collection of charities can have very significant consequences for the rest. The relatively impressive responses to this survey should not be an excuse for avoiding the authors' recommendations to provide greater clarity to boards of charities about their duties and less complex regulation.

Gabrielle Golding focuses on the destruction of private time and home life by technology in 'The Right of Disconnect in Australia: Creating Space for a

2 Disclosure: The author of the Foreword is the Chair of the Board of a charity.

New Term Implied by Law'. The article surveys the corrosive effect of leaving employees almost permanently on call and how this can be arrested by conferring a right to disconnect with a corresponding obligation on employers not to intrude. The article looks across various jurisdictions and seeks possible answers in enterprise bargaining and legislative change before focusing on the possibility of judicial-led reform through the implication of an implied term in employment contracts conferring a right to disconnect. The author fairly acknowledges that the trend of recent High Court authority is running against the implication of any new terms, including such a right, but perhaps takes a longer view that the courts will return to developing the common law to address social problems when legislatures do not act. Even without a new implied term specifically addressed to the right to disconnect, something similar might be accepted as simply a particular aspect of an employer's obligation to provide a safe system of work, which has been recognised as an implied contractual obligation for many years.[3] Time will tell on that front, but having read this article, I suspect that once the idea of a right to disconnect enters the zeitgeist it will acquire a force of its own.

And onto equality.

Jane Kotzmann, Morgan Stonebridge and Paulien Christiaenssen take on the legally challenging concept of animals as legal entities or, as they describe it, an animal having 'legal personhood' in their article, 'Evolving Conceptions of Legal Personhood: What Might Recent Legal Developments Herald for Non-human Animals in Australia?'. The recent developments the authors speak of are multifarious but include a series of (successful) recognition of natural bodies, such as rivers and lakes, as legal entities in overseas jurisdictions and (unsuccessful) applications for *habeus corpus* for detained animals, including such an application made on behalf of 'Tommy' the chimpanzee to release him from captivity.[4] The authors are under no illusion as to the difficult path such recognition faces, especially in a country with such a strong agriculture sector as Australia. They (wisely) conclude that '[a]ny change to the property status of animals in Australia would likely result from an action of the legislature as opposed to the judiciary.' One particular strength of the article is that its description of the practicalities of how such recognition works does not look too different to an extension of the use of statutory or charitable trusts except that, instead of having a duty to protect the interests and welfare of animals, the trustee owes a duty to the animal as a juristic person. I suspect that Australia will continue to follow developments elsewhere on this front, but one possible advantage of federation is that it offers the potential for local or state-based experimentation on this and other fronts that unitary countries cannot.

Kay Wilson and Christopher Rudge's article, 'COVID-19 Vaccine Mandates: A Coercive but Justified Public Health Necessity', is a welcome and timely contribution to what will hopefully be an ongoing retrospective of the legal responses to the COVID-19 pandemic by the three arms of government. The article's

3 *Commonwealth of Australia Bank v Barker* (2014) 253 CLR 169, 190 [30] (French CJ, Bell and Keane JJ); *Tame v New South Wales* (2002) 211 CLR 317, 365–6 [140] (McHugh J).

4 *Nonhuman Rights Project Inc v Lavery*, 24 AD 3d 148 (NY, 2014).

historical review of vaccine 'coercion' or mandates in the United Kingdom ('UK') over two centuries illustrates that organised political responses to such measures that include conspiracy theories and misinformation are not new. The article traces the development of persuasive or coercive vaccine measures in Australia prior to and during the pandemic, as well as the mostly unsuccessful court challenges to such measures. The article outlines the legal and political arguments in favour of and against the mandates with the arguments against including concerns about the violation of bodily integrity. This topic is the subject of competing decisions and the authors' analysis is particularly informative. The authors eventually conclude that the measures were justified but acknowledge the costs of its implementation, including the 'stok[ing of] suspicion and scepticism among a minority'. They are right to note that because, while it can be easy to dismiss radical opponents of mandates as political fringe dwellers, in this country the coalescing of anti-vaccination groups and so-called 'sovereign citizens' into a sizeable group, albeit still a small minority, poses challenges for governments and courts.

A considered retrospective on the measures adopted, of which this article is an exemplar, is necessary as the pandemic required urgent government responses to health risks posed to the entire population in circumstances where information about those risks changed quickly. The courts addressed challenges to those risks in similarly urgent contexts. That said, one important aspect of the context of those decisions was that there was no legally or politically credible suggestion that the vaccine mandates were intended to achieve some ulterior purpose other than the protection of public health. Sometimes the same cannot be said for strict measures imposed in times of war or civil disobedience. Unlike the UK and European courts, Australian courts did not address the various challenges to such measures via a human rights instrument or perspective. Even so, there was no real difference in outcomes between those forums. The position was different in the United States, but that country is now *suis generis* when it comes to considering what rights are to be protected and how the courts should do that.

Julia Quilter et al's article, 'Intoxication Evidence in Rape Trials in the County Court of Victoria: A Qualitative Study', provides us with the result of a granular analysis of the significance of the intoxication of either the complainant, the accused, or both in 33 single-accused rape trials conducted between 2013 and 2020 in the County Court of Victoria. The authors acknowledge the limitations of their study, both in terms of sample and the material made available in each trial, but the results seem broadly consistent with anecdotal feedback about its use in District Court trials in New South Wales.

Three particular findings from the study stand out. First, the study confirms that the intoxication of the complainant and, to a lesser extent, the accused are deployed for different purposes, but the most common use is an attempt to undermine the reliability of the complainant's recollection, especially so far as consent is concerned. Second, there was relatively little reliance by the Crown on section 36(2)(e) of the *Crimes Act 1958* (Vic), which negates consent in circumstances where the complainant is so affected by alcohol or another drug to be incapable of consenting to the relevant sexual act. This has its equivalents

in other jurisdictions and,[5] short of the circumstance of intoxication rendering the complainant unconscious which is itself a circumstance negating consent, there appears to have been little consideration or guidance given by the courts or the legislature as to what level of intoxication reaches that threshold. Third, there is a notable absence in these trials of expert evidence concerning the effects of intoxication, especially on the reliability of a witness's memory. Instead, the parties appear to proceed on their own ad hoc understandings or those of witnesses. The authors cite expert evidence to the effect that intoxication from alcohol can affect the completeness of an individual's memory but does not appear to decrease the accuracy and reliability of what they can recall. If evidence of this kind was introduced, I suspect it would be of assistance to juries and unlikely to be seriously disputed. Perhaps that is the next step in the ongoing efforts to eliminate the role of stereotypical thinking in these trials.

Another large empirical study is the subject of Anthony Hopkins et al's article, 'Indigenous Experience Reports: Addressing Silence and Deficit Discourse in Sentencing'. The authors reviewed 139 judgments of the Supreme Court of the Australian Capital Territory, spanning more than a decade, in which an Indigenous offender was sentenced. The authors conclude that 'there is a prevailing silence and limited evidence of strengths-based approaches'. The 'prevailing silence' refers to the authors' assessment that, in many cases, the Court did not substantively engage with the offender's experience as an Aboriginal and/or Torres Strait Islander person, although it was accepted that this may be because little or no material was placed before the Court to enable it to undertake that engagement. The concern about the absence of strengths-based approaches is that the material produced narrated the offender's disadvantage and dysfunctional upbringing without describing their individual strengths and that of their family and community. The authors propose the adoption of First Nations Justice Reports to provide a more holistic account of an individual offender's personal and cultural circumstances, including their strengths, with the individual retaining the right to preclude their report being read in open court or disclosed for some other purpose. As that proposal implies, aspects of the article disputes some of the fundamental principles of the sentencing system, including open justice as well as the focus on individualised justice and the offender's degree of social disadvantage that was emphasised in *Bugmy v The Queen*.[6] The authors also seek to have sentencing judges engage with 'colonialism and its impacts, and with the strength of survival, resistance and resurgence'. These are large goals, and it will be interesting to see whether they generate a legislative response. Leaving that aside, any expansion of the means of providing to courts material about an Indigenous offender's personal and cultural circumstances is to be encouraged.

The very concept of equality itself is up for debate in the last article by Emma Genovese, 'The Spectacle of Respectable Equality: Queer Discrimination in Australian Law Post Marriage Equality'. 'Respectable equality' is described as the 'provision of queer rights that are qualified by, and imbued with, cis-

5 See, eg, *Crimes Act 1900* (NSW) s 61HJ(1)(c).
6 (2013) 249 CLR 571.

heteronormative standards'. The article analyses two forms of discrimination, one described as direct and the other as indirect, being a distinction that appears to reflect the drafting of most forms of anti-discrimination legislation.[7] With direct discrimination, the two instances examined are the differential blood screening standards applied to certain sects of the LGBTIQ+ community and the very different legislative schemes for recording changes of sex or gender on birth certificates in place across the different states and territories. With indirect discrimination, the article sets out the results of what must have been a back-breaking study into the language of state and federal legislation. The drafting was found to reinforce 'cis-heteronormativity and hinders true equality' by using 'binary gender references and unnecessarily gendered terms'.

What appears to underly the article is a concept of 'discrimination' that seemingly departs from the legally accepted meaning of that phrase.[8] Thus, the article gives the passage of legislation enabling same-sex marriage as an example of 'respectable equality'. This change is derided on the basis that, while it 'appears to grant equality to members of the queer community who are not in heterosexual relationships and would like to marry one other person. In actuality … [it] exclude[s] the interests of people who are not deemed respectable, such as queers in polyamorous or non-monogamous relationships'. This example is ironic to say the least, in that one of the persistent arguments made by opponents of same-sex marriage was that it would result in the legalisation of polygamy.[9] The argument was rightly rejected as offensive. Polyamorous, non-monogamous and other relationships that are not exclusive to two people are found within the queer and the 'cis-heteronormative' communities. On currently accepted legal understandings of the concept of 'discrimination', the institution of marriage as now defined is not discriminatory.

Debates about whether some practice, institution, benefit or burden is relevantly discriminatory will no doubt continue and should be welcomed. How a fracturing in the core meaning of discrimination will affect those debates is unclear.

Enough of the Foreword. Time for the articles themselves.

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7 *Street v Queensland Bar Association* (1989) 168 CLR 461, 566 (Gaudron J).

8 See ibid 570–4 (Gaudron J); *Castlemaine Tooheys Ltd v South Australia* (1990) 169 CLR 436, 480 (Gaudron and McHugh JJ).

9 See Jonathan Swan, 'Bernardi: I Was Right on Gay Marriage and Polygamy', *The Sydney Morning Herald* (online, 18 June 2013) <https://www.smh.com.au/politics/federal/bernardi-i-was-right-on-gay-marriage-and-polygamy-20130618-2offe.html>.

THEMATIC
LIFE SCIENCES: ETHICS, INNOVATION AND THE FUTURE OF LAW

Artwork by Maggie Stein