

jurist · diction

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PRESCRIPTION AND PRECEDENT: GLOBAL HEALTH LAW



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A Message from the Dean

Professor Greg Tolhurst

The University of Sydney is deeply committed to the improvement of public health, and this commitment is reflected in the decision to create the Charles Perkins Centre with its focus on obesity, diabetes and cardiovascular disease. This is a multidisciplinary centre, conducting world-class research into these leading causes of mortality. Its focus is not limited to clinical research but includes public health and social policy research. Resolving problems such as obesity requires researchers from many different fields; it is a problem that needs to be prevented through education and lifestyle changes, rather than 'cured'. Given the flagship status of the Charles Perkins Centre and the world-class health law team we have here at the Sydney Law School, it is appropriate that we dedicate an edition of *JuristDiction* to Global Health Law.

We begin with a profile of The Hon Peter Garling, now a Justice of the Supreme Court of New South Wales, whose *Special Commission of Inquiry into Acute Care Services in NSW Public Hospitals* represents an important prescription for improving the quality and affordability of health care services in NSW and beyond. Professor Roger Magnusson looks at the history of teaching health law at university and the growth of specialisations in this area. He raises the issue of ethics and the problem of the ethical debate keeping up with the rapid advancement of medical technology.

Dr Arlie Loughnan considers the issue of madness and crime in the context of the *Breivik* trial in Norway, and deliberates on the question of the appropriate response to offenders who are criminally responsible, the necessity of keeping responsibility and the extent of harm caused distinct, and how we distinguish different types of incapacities.

Emeritus Professor Terry Carney's article discusses mental health and guardianship

models focusing on different priorities in developing and developed countries, the current questioning of the extent to which we intervene in the lives of vulnerable people, whether detention and treatment should be dealt with as separate questions, the right to choose or not to choose treatment and the need to support people to make their own decisions as opposed to transferring decision-making to third parties.

Professor Cameron Stewart considers the legal and ethical issues surrounding the storage of umbilical cord blood and the state of the current debate in this area. Our feature article is on the career and future hopes of Professor Larry Gostin, a visiting Professor of Global Health Law at Sydney Law School, who has dedicated his life to improving the status of mentally ill people and ending health inequality. Janine McIlwraith looks at the extent to which litigation can be used successfully to change clinical practices to solve systematic problems.

Sydney Law School graduate Alexandra Jones' interest in global health issues began during her time as a student and in her article she considers her future and reflects on her work since graduation, including working in a community legal centre and then taking a volunteer placement in Cambodia.

One of our most distinguished alumni, The Hon Michael Kirby AC CMG, spoke recently at the 50th reunion of graduates from 1962. In this edition, we reproduce some of that speech, giving a fascinating insight into what life at Sydney Law School was like, 50 years ago.

Finally, we note with sadness the passing of the Hon David Hodgson AO and Frank Walker QC and acknowledge the extraordinary contribution they made to law and justice in this country.

I hope you enjoy this edition of *JuristDiction*. Please let us have your comments and ideas.

Justice Peter Garling

Chris Rodley

For much of his legal career, Justice Peter Garling (BA 1975, LLB 1977) has been the 'counsel of choice' when things go wrong', in the words of former NSW Attorney General John Hatzistergos. He has been there in the aftermath of some of the state's most high-profile disasters of the past three decades, playing an integral role in the hearings and lawsuits that have sought to find answers and make amends.

His name is perhaps best known as the author of the 'Garling Report' into the NSW Public Hospital system in 2008. As with many of the enquiries in which he has been involved, it was triggered by a human tragedy: a 16-year-old girl, who had been struck in the head by a golf ball, had died after serious lapses in her care at Royal North Shore Hospital. The coroner who investigated her death was so disturbed by the case that he proposed an enquiry. Peter Garling, then a Senior Counsel, was tapped by the NSW Government to lead the investigation into acute care services and how to improve them.

Soon after beginning his year-long study, he recalls being struck by the 'toxic relationship' between hospital administrators and doctors. 'They were not communicating and had completely different goals,' he says. 'I was quickly left with the impression that the patient was the forgotten person.'

As a result, one of the core recommendations of his 1300 page report was to put the patient back at the heart of the hospital system. He also proposed giving clinicians more responsibility for developing cost-effective models of care, and making information about the health system more transparent by publishing hospital performance data. 'Once clinicians can see the results of their performance, and compare them with others, their professionalism will drive improvement,' he explains.

His findings were largely accepted by the NSW government, and have had a lasting impact on health care in the state. Responsibility for driving improvement has been given back to clinicians (a doctor-led campaign has seen hand-



washing rates rise from less than 20 per cent to over 80 per cent). A new Bureau of Health Information, the first of its kind in the world, publishes hospital data in almost real time, while an Agency for Clinical Innovation now drives ongoing improvement in care.

Despite the warnings in his report about the failings in our hospitals, the author stresses he came away deeply impressed by the dedication of staff. 'If anything, it reaffirmed my faith that NSW has a first class, though not perfect, health system,' he says.

Choosing a career in life was not a difficult decision for the young Peter Garling, whose three older brothers all studied law, two of them completing law degrees at Sydney Law School. He also has a famous legal ancestor: Frederick Garling was one of the first two Crown Solicitors in NSW, having been lured out to the nascent colony in 1815 by Deputy Judge Advocate Ellis Bent (who refused to allow legally-trained convicts to appear in court as lawyers).

Following in their footsteps, he duly enrolled in a degree in Arts and Law in 1970. It was turbulent time to be a student at The University of Sydney, with strident anti-Vietnam War demonstrations

and building occupations on campus. At the same time, he says, the atmosphere was more starched and formal than today: students wore coats and ties to class, and faculties tended not to mix with each other. He also recalls the mid-1970s as being a time of inspiring law lecturers, including the late Roddy Meagher and jurisprudence scholar Alice Tay, as well as current High Court Justices Dyson Heydon and William Gummow.

Two years after graduating, Peter Garling was called to the Bar. He quickly made a name for himself as the go-to counsel for large-scale class actions, acting in cases relating to the series of HIV transmissions in the 1980s caused by tainted blood transfusions, and many other prominent matters.

In parallel with his role as a litigator, he appeared at over a dozen commissions and public enquiries. Many came in the wake of tragedies, such as the 1996 Sydney bushfires, the Waterfall and Glenbrook rail disasters, and the Thredbo landslide, while others were in response to public controversies such as the collapse of HIH or alleged corruption.

Often, the hearings held after major disasters exposed him to harrowing stories from first responders. Justice Garling remembers one particularly moving story from a rescue paramedic at Thredbo who, at great personal risk, refused to leave the site when it was evacuated. He spoke of keeping up a tapping sound so that a survivor, buried alive a few metres away, would not think the rescue had been abandoned. 'It was without doubt the bravest thing I've heard,' he says.

In 2010, Peter Garling's career pivoted in a new direction when he was appointed as a judge of the Supreme Court of NSW. The work of deciding disputes or ensuring defendants receive a fair trial is both satisfying and intellectually challenging, he says, though not as different from his previous career as one might think: 'You're in the same courtroom, everyone's dressed the same, you're just sitting in a different spot and doing a different task,' he says. 'It's a role I've spent 30 years practising for.' *jd*



Evolution of Health Law: From 'Law and Medicine' to 'Global Health Governance'

Roger Magnusson

The study of health law, whether at LLB/JD, LLM or PhD level, remains popular at Sydney Law School and reflects the growth and maturity of the field. This is not surprising: in 2009–10, health spending in Australia exceeded \$121 billion, reaching 9.4 per cent of gross domestic product.¹ The legal and regulatory issues raised by the health sector are complex and varied. Health law is not only an area of specialised legal practice, but, as with environmental law, has continued to evolve global dimensions. Academic health lawyers are just as likely to be partnering with international NGOs and agencies and to be working on governance strategies for responding to shared health threats from a global perspective as they are to be working on professional liability issues arising from medical practice in Australia.

The rise of health law has been rapid and profound. What is health law and how is it evolving? One way of understanding

the wide scope of the field is to see it as encompassing five inter-related areas of academic and professional activity (Box A).

In one sense, health law is not new. Courts have addressed issues relating to medical treatment for more than 100 years. In *Hillyer v Governors of St Batholomew's Hospital*,² the court held that although a hospital is responsible for exercising due care when selecting its professional staff, it is not responsible if any of them (surgeons, physicians, nurses etc) act negligently in matters of professional care of skill. Courts have since come to recognise both the vicarious liability of institutions for the acts of employees and others engaged in the business of that institution, as well as the direct and non-delegable duty owed by a health care institution to those patients who knock on its doors.

Throughout the 20th century, courts have also been required to decide on liability when patients suffered harm following treatment by doctors. One 'early' case (1954) was brought by two paralysed plaintiffs who received a spinal anaesthetic contaminated with phenol, a form of carbolic acid.³ As medicine's capacity to intervene has become more sophisticated, courts have also been required to identify the circumstances in which the withdrawal of treatment and medical technology will be appropriate and lawful. A well-known example was the case of 17-year-old Anthony Bland, whose lungs were crushed and perforated in the fatal crush at the Hillsborough football stadium.⁴ Through prolonged oxygen deprivation, Anthony's

Box A: Conceptualising health law

- Health care law
- Mental health law
- Public health law
- International health law and 'global health governance'
- Law & health development (in low- and middle-income countries)

cerebral cortex had 'resolved into a watery mass'. For the next four years, until the House of Lords gave its declaratory judgment in February 1993, he lay in a persistent vegetative state which doctors had unanimously concluded was permanent and irreversible. The House of Lords held unanimously that where, in accordance with a responsible body of medical opinion, a doctor concludes that further medical treatment will be of no benefit to a permanently unconscious patient, there is no duty to provide such treatment, and that life-preserving treatment may be withdrawn.

During the 1980s, Australian universities began to offer the first specialised courses in medical law. American cases featured prominently, because there was no coherent body of medical law based on Australian — or even English — sources.

If a date must be chosen, we might say that the field of health care law came into existence in August 1968. This was the date that the *Journal of the American Medical Association* reported on the work of the ad hoc committee established by the Harvard Medical School. This committee reported that responsible medical opinion was now ready to adopt new criteria for defining death in circumstances when an individual had suffered 'irreversible coma as a result of permanent brain damage'.⁵ These criteria were subsequently included in the Human Tissue Acts passed by Australian states and territories during the 1980s.

The ad hoc committee's report signals a key factor behind the growth of medical law. The rapid growth of medical technology greatly expanded the scope of medical practice, but left large gaps in normative ethics. The academic and professional field of bioethics evolved to fill this gap — and continues to expand today. What is less well recognised is that bioethics — and the medical technologies and possibilities that it addressed — also accelerated the evolution of medical or health care law. Unrecognised as a separate discipline in the middle of last century, the rise of health care law is testimony to how the uncertainties and possibilities that characterise medical care and the application of medical technology have been progressively transformed into law and regulation.

Litigation and legislation have both played a part in this. In general, politicians are reluctant to legislate in morally-contested areas, with the exception of those 'conviction politicians' who are personally motivated to see their moral convictions enacted as law. There can be no better example of the reluctance of Parliament to legislate than abortion law in New South Wales: the interpretation of highly ambiguous *Crimes Act* provisions that determine the parameters of acceptable medical practice rest on a District Court judgment from 1971!⁶ At a national level, it is not surprising that many of the most complex and difficult issues have been referred to law reform commissions: human tissue transplants, gene patents and genetic information, privacy, informed medical decisions, and at state level, many issues relating to assisted reproductive technology. But although Parliaments may be reluctant to become involved, the courts have no choice. As Professor Ian Kennedy (the pioneer of health law in the United Kingdom) has written:

Beset by problems which are immensely difficult, going to the heart of what we want for ourselves and for others, and faced by public institutions which are reluctant to act, those with something to gain or lose will take their claim to the courts, *the one institution which, once asked, cannot refuse to supply a response*. Of course, when the courts do step in, the subtle and difficult question of whether the issue really does call for legal regulation becomes moot. The court is stuck with the problem and must make a decision. Public policy there will be and *it will be law*.⁷

In applying the principles and traditions of the common law to the disputes and dilemmas arising from health care, personal autonomy has rapidly become the most powerful value in medical law.

While health care law remains the largest field of academic study and practice, within the broader category of health law, things are changing rapidly. Mental health law and public health law might be considered the neglected cousins of health care law, at least in Australian law schools. Both deserve to be studied in their own right. Mental health law is usually only approached in a piecemeal fashion, absorbed within medical law courses (through topics such as competence to consent), or indirectly through courses in succession, criminal law, and disability and anti-discrimination law. Public health law has tended to be ignored entirely, although health has emerged a kind of secular virtue in some circles, and the subject is undergoing a well-deserved renaissance.⁸

*Public health law has tended
to be ignored entirely...
and the subject is undergoing a
well-deserved renaissance.*

Academic interest in public health has been partly re-energised by growing appreciation of the effects of globalisation on health. The growth of international health law is one manifestation of this. Perhaps the clearest example is the *World Health Regulations* (IHR), revised following the SARS epidemic, which provide an international regime for the control of transmissible diseases.⁹ The IHR set out a decision instrument for determining when national disease outbreaks are reportable to the World Health Organisation (WHO), on the basis that they are a 'public health emergency of international concern'; they also require countries to establish a national focal point for communications with WHO. Another important example is the *Framework Convention on Tobacco Control* (FCTC).¹⁰ Tobacco kills 6 million people each year: it accounts for 12 per cent of all male deaths and 6 per cent of female deaths, mostly in developing countries.¹¹ Signatory states to the FCTC are required to implement evidence-based tobacco control measures into their domestic laws. Despite this, due to population growth and the activities of multinational tobacco companies, the number of smokers will continue to increase this century, their deaths far exceeding the 100 million who died from tobacco-related diseases during the 20th century.

The concerns of global health law extend well beyond the development of normative standards by the WHO. The global trade rules embodied in the World Trade Organization (WTO) Agreements are the ground rules for an open, trading, global economy. Their impact on national prosperity is immense, yet the difficulty of accommodating national health concerns within the practical application of these rules has fuelled the rising specialty of trade law and public health.¹² Australia's experience with challenges to the *Tobacco Plain Packaging Act 2011* (Cth) under WTO rules and under a Bilateral Investment Treaty with Hong Kong, is one example.¹³

There has been growing recognition in recent decades that improving health, and managing the many determinants of health, is not something that governments can effectively achieve alone. As Kaul has written, 'Public today no longer refers only to the State', but means bringing the public together to explore concerns, preferences, and 'a fair bargain for all' —

often with participation from civil society organisations.¹⁴ The rising field of 'global health governance' looks beyond law to the way that health is governed and managed at the international level. Seen from this broader perspective, law is an important strategy for health governance, but it is also an under-studied determinant of health in its own rights. An important critique of the impact of law on health is the recently-published report of the Global Commission on HIV and the Law, which implicates punitive laws, punitive policing, and neglect of human rights as major obstacles to reducing the global burden of HIV/AIDS.¹⁵

Concern with global health has naturally brought the health challenges faced by low- and middle-income countries into greater focus, and law's role in health development is an expanding area of scholarship. Increasingly, scholars are partnering with NGOs and international agencies. One example at Sydney Law School is the memorandum of understanding with the International Development Law Organisation (IDLO). IDLO is an inter-governmental organisation based in Rome, Italy, which exists to 'strengthen the rule of law, human rights and good governance in developing countries'.¹⁶ The MOU with IDLO will strengthen not only the research and teaching of health law at Sydney, but will contribute to our new Master's program in Law and International Development.

Where is health law headed in the future? As far as health care law is concerned, it is interesting to look back at predictions for the field made 20 years ago by Ian Kennedy (Box B). Daily newspaper reports, not to mention caselaw and legislation, illustrate the accuracy of the directions and developments Kennedy predicted, although the process is far from complete.

Box B: Predicting the future: some growth areas for health care law¹⁷

- An aging population, expensive health care costs, giving rise to questions about self-determination in end-of-life decision-making, and questions about the care of the dying
- How to regulate reproductive medicine, and foetal/maternal conflicts (as the foetus becomes more visible, thanks to technology)
- Genetic screening
- Scarce resources; allocation of resources
- Access to, and control of, health information
- Medical mishaps, adverse events, liability, litigation
- Care of the vulnerable, mentally ill, mentally handicapped, elderly and poor, and of those with stigmatised diseases

Outside of health care law, there is growing interest in understanding law's role in *systems* — a sustainable food system, for instance, and more generally, in the potential for law to improve not only *average* levels of health (the traditional focus of public health), but to address concerns about health equity — the disparities in health that arise if one's *only concern* is average health. Systems and equity concerns come together in a growing interest in the concepts of health security and sustainability: creating the conditions for a healthy life, both now and for future generations.

Within the span of a few decades, the field of medical law has expanded from its original focus on liability for adverse events to defining law's role in strategies for health development, redressing injustices and encouraging respect for the right to health on a global scale. Not bad for a field that didn't exist until 1968! *jd*



- 1 Australian Institute of Health and Welfare (AIHW), *Health Expenditure Australia 2009–10* (AIHW, October 2011) 8–11.
- 2 [1909] 2 KB 820.
- 3 *Roe v Minister of Health* [1954] 2 QB 66.
- 4 *Airedale NHS Trust v Bland* [1993] AC 789 (HL).
- 5 The Ad Hoc Committee of the Harvard Medical School to Examine the Definition of Irreversible Coma, 'A Definition of Irreversible Coma' (1968) 205 *Journal of the American Medical Association* 337–40.
- 6 *R v Wald* (1971) 3 NSW DCR 25, interpreting *Crimes Act 1900* (NSW) s 83.
- 7 Ian Kennedy, 'The Medical Frontier' in L Howe and A Wain (eds), *Predicting the Future* (Cambridge University Press, 1993) 96, 111 (emphasis supplied).
- 8 Lawrence Gostin, 'Public Health Law: A Renaissance' (2002) 30 *Journal of Law, Medicine & Ethics* 136; Roger Magnusson, 'Mapping the Scope and Opportunities for Public Health Law in Liberal Democracies' (2007) 35 *Journal of Law, Medicine & Ethics* 571.
- 9 WHO, *International Health Regulations* (2005) (WHO, 2nd ed., 2008).
- 10 *Framework Convention on Tobacco Control*, Geneva, World Health Organization, 2003, entered into force 27 February 2005.
- 11 WHO, *Global Status Report on Noncommunicable Disease* (WHO, 2010) 17.
- 12 See eg, Benn McGrady, *Trade and Public Health: The WTO, Tobacco, Alcohol and Diet* (Cambridge University Press, 2011).
- 13 T Voon et al, *Public Health and Plain Packaging of Cigarettes* (Edward Elgar, 2012).
- 14 Inge Kaul, *Global Public Goods: What Role for Civil Society?* (2001) 30 *Nonprofit and Voluntary Sector Quarterly* 588, 594.
- 15 Global Commission on HIV and the Law. *HIV and the Law: Risks, Rights & Health* (UNDP, 2012).
- 16 International Development Law Organisation.
- 17 Ian Kennedy, above n 7.



Roger Magnusson is a Professor of Health Law and Governance at Sydney Law School

Mental Health and Guardianship Laws:

Which Model is Best and Does It Work?

Terry Carney

The extent of rights of citizens to decide things for themselves or to access essential community services such as health care, is the stuff of political debate the world over. It has been thus for centuries.

When it comes to mental health care or decision-making for people with impaired capacity, countries respond in different ways. Even within federal systems of government such as Australia, jurisdictions differ about how best to respect the right to choose (individual autonomy) or what, if any, rights citizens have to leverage services (social rights).

International human rights treaties, including the recently adopted *Convention on the Rights of Persons with Disabilities*, set down principles and standards to guide government policy and inform lawmakers, but globally these differences are accentuated. Many developing countries severely lack trained health professionals or health infrastructure. The appropriateness or otherwise of any mental health law means little, if there are virtually no services for those in need. Capacity-building and development assistance are the more vital issues for such countries. If Australia is indeed reimagining itself as a contributor to development in the Asian and Pacific region, then surely foreign aid to assist our near neighbours to meet such needs should be a priority in the Asian Century?

Differences of approach are found on many other issues as well. The paternalism of intervening in the lives of vulnerable people, such as those with diminished capacity, in order to advance their 'best interests', is increasingly being called into question, though it has quite ancient origins in Roman law and 13th-century common law; likewise the Australian law habit of wrapping together involuntary detention with authority to treat without consent. Of course, it can be argued that it is unjust to detain people without treating the illness that supposedly warrants that detention, but North American models whereby detention and treatment are viewed as separate questions surely have merit (as Tasmania has recognised).

The right to choose to be treated (or not) is part and parcel of the civil rights of ordinary citizens. When capacity is lost or impaired, adult guardianship laws seek to restore this right of citizenship. But, to date, these laws too have been rather paternalistic, transferring the decision to a third party. *The Convention on the Rights of Persons with Disabilities* now prioritises autonomy-enhancing principles, such as 'supported decision-making', but even wealthy countries may struggle to find the resources to enable this to be properly achieved, especially for older or friendless individuals. For certain groups, such as people with a profound intellectual disability, or in cases where public resourcing is slim, the on-the-ground experience of supported decision-making may not be very different from old-style guardianship.

Moreover, guardianship laws also vary greatly around the world. Some jurisdictions, such as those in North America,

place great reliance on advance private planning tools (enduring powers of attorney). Others prefer to give presumptive legal backing to informal family or civil society arrangements (such as a hierarchical 'list' of people presumed to have legal powers of decision). In short, the legal configuration of both guardianship and mental health laws is characterised by a multiplicity of approaches. While some socio-legal studies have been undertaken in various countries to assess the adequacy or otherwise of this cornucopia of different models — including studies led by the author into adult guardianship, mental health tribunals and legal responses to particularly vexing conditions such as severe anorexia nervosa — the real surprise is the paucity of such critical evaluations.

Overdue, but radical, reforms to models of disability service delivery in Australia add to the urgency of discovering what laws are best. Placing money currently devoted to direct funding of public or privately provided services into the hands and control of those needing support, by putting the equivalent dollar value into an individual 'personal budget' controlled by the person, is one such very welcome transformation. This empowering change is already more advanced in some overseas countries (and some Australian jurisdictions), and lies at the heart of the proposed National Disability Insurance Scheme and some national aged care reforms. As more such demands are placed on guardianship or supported decision-making schemes, the need for evidence based answers increases.

Along with longer-standing issues such as the (un)wisdom of dispensing with multi-member tribunal panels in favour of single member hearings, or whether courts and tribunals reach similar decisions when administering otherwise identical legislation (as they did not in studies on anorexia or disability sterilisation authorisations) — there is surely therefore a pressing case for funding more such evidence-based studies of 'what works' and 'why'. *jd*



Emeritus Professor Terry Carney was Professor of Law at the University of Sydney (1991-2012), specialising in welfare law. He is Past President (2005-2007) of the International Academy of Law and Mental Health.



A peaceful demonstration after the Oslo terror attacks

'Madness' and Crime

Arlie Loughnan

Is an individual who commits a particularly serious, violent offence 'mad' or 'bad'? If a mental illness or disorder interfered with their reasoning processes, or perhaps their ability to control their actions, is treatment more appropriate than punishment? On the other hand, if a kernel of individual responsibility remains, shouldn't the criminal legal process result in conviction, and the individual concerned face his or her just deserts?

These are difficult questions and responses to them often attract controversy and consternation. It is such questions that mark out the interface between 'madness' and crime, the point where criminal law principles and processes abut the norms and practices of psychiatry and psychology. This is fraught territory, and lawyers, medical professionals and laypeople may have different views about where dividing lines should be drawn.

This territory is known to criminal lawyers by the label 'mental incapacity'. In criminal law, mental incapacity refers to the cognitive, volitional and moral capacities that an individual accused is both assumed and required to possess. Legal principles and practices, like criminal trials and criminal punishment, depend on these capacities. The area of criminal law that concerns mental incapacity comprises a range of legal provisions, the best-known of which is the 'insanity' or the 'mental illness' defence.

Reflecting the common law as it developed in England and Wales, in NSW the mental illness defence requires the accused to prove that he or she was suffering from a 'defect of reason', caused by a 'disease of the mind' and meaning that he or she could not understand the 'nature and quality' of their act, or that it was wrong. A successful insanity defence results in a special verdict — 'not guilty by reason of mental illness'.

An insanity or mental illness defence raises the issue of whether an individual can be held responsible, at law, for his or her actions. The question of criminal responsibility goes beyond the issue of liability for an offence: it addresses whether the accused is someone to whom the criminal law speaks. Criminal responsibility thus lies at the heart of the criminal justice system. It forms the foundation for core legal processes, such as the criminal trial.

The trial of Anders Behring Breivik in Norway brought the complex issues surrounding criminal responsibility into sharp relief. As is well known, Breivik was convicted of multiple counts of murder, having shot and killed a total of 77 people in central Oslo and on the island of Utoya in July 2011. Breivik admitted planning and carrying out the killings, and is on record as saying he believed they were necessary to start a revolution aimed at preventing Norway from accepting further numbers of immigrants.

Reports indicate that Breivik has been examined by a total of 18 medical experts. Some of these experts concluded he met the legal test of insanity, which, in Norway, requires that he acted under the influence of psychosis at the time of the crime. But Breivik himself has disputed this diagnosis, claiming it is part of an attempt to silence him and stymie his message about 'saving' Norway. Other medical assessments have concluded Breivik was sane at the time of the offences, his actions motivated by extremist ideology and not mental illness.

The judges in Breivik's case concluded that he was sane at the time of the killings, and he has been sentenced to 21 years' imprisonment, the maximum sentence under Norwegian law. Breivik may be imprisoned beyond this period, under a regime of preventative detention that applies to dangerous offenders.

Breivik's case prompts us to think about the most appropriate response to offenders who are not criminally responsible. What would happen to someone like Breivik if he or she were found to be 'insane'?

Unlike an ordinary acquittal, a 'not guilty by reason of mental illness' verdict opens the accused up to a range of court powers of disposal. In NSW, these include the power to detain the person and to release him or her subject to conditions. A person may only be released if he or she or any member of the public will not be seriously endangered by their release.



Anders Behring Breivik.
Image: Heiko Junge. AFP

The seriousness and enormous harm of criminal conduct cannot be denied. But it is important to recall that where an individual has not been convicted, punishment cannot follow. This is because the individual accused has not been treated like any other facing criminal charges.

The traditional justification for a different response is that the accused's condition makes him or her a different kind of legal subject: one who cannot be called to account for himself or herself or to answer for his or her actions in the context of a criminal trial. Such a person may be subject to detention — perhaps even indefinite detention — but is not subject to punishment.

Under Norwegian law, even if Breivik had not been convicted and punished in the normal way, he may have been made the subject of a court order, which, it seems reasonable to suggest, would be aimed at preventing further harm.

This brief discussion hints at the core dilemma for courts and law reformers working in the area of 'madness' and crime: even when a significant harm, like multiple killings, has been committed an accused may not be responsible for his or her actions. Of course this doesn't take away from the serious consequences of offending behaviour but it does leave us with the difficult question of who or what (health services?; society at large?) can be held accountable for it.

It is tempting to depict criminal responsibility as, in effect, a trade off between the severity of an individual's mental incapacity and the magnitude of the harm that results from their offence. But it is important to recall that as a matter of law, in our system, responsibility and harm are separate matters. If an individual is not criminally responsible, the issue of the harm their actions have caused must be dealt with by means other than punishment.



Dr Arlie Loughnan (LLB 2000) is a Senior Lecturer in the Faculty of Law, University of Sydney. She is the author of *Manifest Madness: Mental Incapacity in Criminal Law* (OUP, 2012).

Children at Takeo (outside our Gender and Human Rights training project). Photo by Alexandra Jones



From HIV to Globesity

One graduate's path in Global Health Law

Alexandra Jones

Executing the side-saddle dismount with the ease of a local, I avoid the nasty bite of the hot exhaust pipe and a skulking local stray. In broken Khmer I agree on payment, thanking the driver for the kamikaze motorbike ride from my apartment to the dusty fringes of Phnom Penh.

Moto-helmet in hand, I walk to the rear of a crowded shop-house, the room inside filled with a wife and children in mourning, the lifeless body of a colleague, and the resonant chanting of monks. A cacophony of recorded xylophone blares from ancient speakers, sending Buddhist commiserations into the already sweltering air.

Six months into a volunteer placement, here I was — an uncomfortable foreign witness to this funeral for a death that should not have occurred: our ‘healthy’ 40-year-old local program director dead suddenly overnight. A flurry of whispers: counterfeit pharmaceuticals, amateur diagnoses and traditional remedies, systemic corruption of health systems and absolute failures of emergency care.

One event. A remarkable catalyst for reflection on how I came to be in Cambodia, and also a challenge to so many of my privileged assumptions about equity, justice and health care.

Reflecting on my university education, a montage arises — snapshots of diverse mentors and experiences lining the path I walk today. Lively breakfast debate over newspaper opinion pieces with a social activist, academic parent. Semesters in teeming undergrad philosophy lecture halls, deconstructing the likes of Kant, Marx and Dworkin, grasping a flexibility of perspective to complement the specialised demands of the study of law. The first sparks of internal outrage during law lectures from a South African advocate, speaking to the interrelationship of law and pharmaceutical politics on availability of treatment for the poor living with HIV/AIDS. Research and editorial assistance as a complement to the completion of my LLB, gaining practical experience at the cutting edge both public health and law. Perhaps most importantly, the invaluable relationships forged with senior lawyers and professors, who continue to foster my desire to contribute at the forefront of a field of law I can not only practise, but take pride in.

After sealing halcyon years on the lawns of Sydney University with the adventure of Swedish exchange, I returned to a graduate place at Henry Davis York in Martin Place's legal heartland. Revelling in the company of sharp minds, I enjoyed the thrill of overcoming nerves to conquer the amateur dramatics of routine court appearances, while mastering the minutiae of client demands, complex case law, and domestic legislation. I gained a realistic picture of life as an Australian commercial solicitor, beyond crisp suits and polished foyers.

Ultimately, however, my most enjoyable experiences as a young practitioner came after hours under the fluorescent din of community legal centre lights. Raw expressions of gratitude from pro bono clients watered the seeds of motivation to trade secure Sydney for a life in Cambodia educating, and advocating for human rights.

A colleague's throwaway introduction on arrival to 'life as a lawyer in the land of the lawless' hinted at the murky legal context I would face: advocacy in the absence of a functioning court system and 'unofficial' drafts of legislation for 'off the record' consultation. I witnessed the juxtaposition of de jure rule of law, while around me communities were routinely subjected to violations of rights and practical obstacles to real justice. Life in Cambodia provided a crash course in delivering outcomes in a cross-cultural and multilingual environment, where local, international, government and civil society actors possess competing objectives and overlapping ambitions. Hurdles to progress, such as poverty, political instability, ineffectual management, corruption or sheer absence of political will, became a personal practical reality.

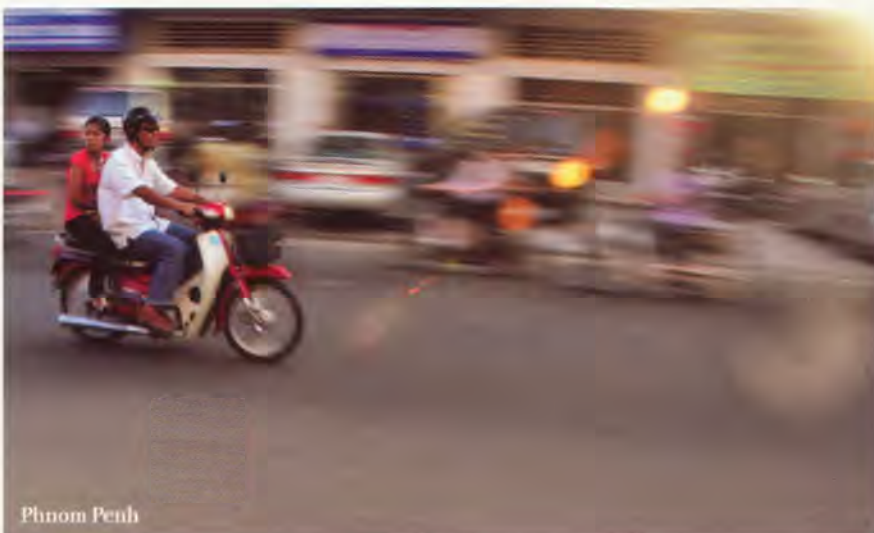
After a year in Cambodia, I stood at the intersection of health, law and human rights with a new appreciation that the states bearing the disproportionate burden of disease are also those with the least capacity to do anything about it. Trading the hustle of Phnom Penh for the silent grandeur of American law school libraries was at first an uneasy luxury, though studying in an epicentre of international governance such as Washington DC provided a wonderful forum to engage with international scholars (unsurprisingly among them, a good few Australians!) at the forefront of this emerging area of public international law and policy. The LLM experience provided an opportunity for me to fuse an already interdisciplinary background at the international interface of health, international relations, development, foreign policy and trade. In a further Fellowship with Georgetown's O'Neill Institute I have joined teams working on legal and policy implications of rolling out emerging HIV innovations in Africa, travelled to Uganda with students interviewing women on access to contraception, and taught members of the Indian Health Ministry how to apply the International Health Regulations in the case of an outbreak of pandemic influenza.



With Nicola Roxon and Benn McGrady at Georgetown Law Center

Thoughts first provoked by funereal whispers continue to drive my desire to utilise law's potential to create conditions that enable people to live healthier lives. As the global burden of infectious disease stabilises, the world looks with increased attention to the growing international burden of non-communicable diseases like cancer, cardiovascular disease and diabetes, which now cause 63 per cent of deaths annually. Eighty per cent of these occur in low and middle-income countries, bringing not only health, but also development concerns, as the catastrophic expenditure on treatment forces people into, or entrenches them, in poverty.

As lawyers, we must ask what the law can do to prevent and control these conditions. The relationship of law with behavioural risk factors such as tobacco use, harmful use of alcohol, poor diet and physical inactivity remains complex and contested. Despite a range of known effective interventions, tensions between personal responsibility, freedom, and the broader public interest in a healthy, productive population continue to invigorate international debate. At a time when the World Health Organisation faces unprecedented financial strain, the quest to find innovative ways to build international coordination, and to assist states in implementing evidence-based policy in the face of powerful corporate interests, takes on increased urgency. Whether advocating for New York Mayor Bloomberg's proposed soda restrictions, or defending the Australian government's plain packaging of cigarettes against action under international trade and investment law, with 52 million largely preventable deaths estimated to be at stake by 2030, it is important to remember that regulators, not only curative medicines and doctors, may reduce risks and save lives. *jd*



Phnom Penh



Alexandra Jones has a BA (2004) and an LLB (2006) from the University of Sydney. She completed her LLM at Georgetown University, Washington DC in 2011, and is currently a Law Fellow at the O'Neill Institute for National and Global Health Law, Georgetown University Law Center.

Cutting the Cord:

Legal Regulation of Umbilical Cord Blood in Australia

Cameron Stewart

Umbilical cord blood (UCB) has traditionally been treated as a waste product, but with the growing scientific understanding of stem cells, it has become a vital source of stem cells for medical treatment. The stem cells derived from UCB can be used in haematopoietic stem cell transplantation (HSCT), which is a curative therapy for many cancers (leukaemia, lymphoma), bone marrow failure syndromes, haemoglobinopathies, immunodeficiencies and inborn errors of metabolisms. As the science for stem cell therapies improves, there is also real potential for UCB to be used as part of a regime for emerging regenerative therapies. As the success of these therapies has become known, the demand for cord blood has grown, and it has quickly become necessary to establish UCB banks. The Centre for Health Governance, Law and Ethics at Sydney Law School and the Centre for Values, Ethics and the Law in Medicine at Sydney Medical School have been working together to examine the problems of regulating these banks as part of a National Health and Medical Research Council funded study.

Private and Public

UCB banks fall into two categories: government-funded public UCB banks, which store *donated* blood for public access; and private cord banks, which will, for a fee, *bank* an individual's blood for personal use. Both types of banks exist in Australia. When UCB is used to treat a condition in the child from whom the blood originated it is referred to as *autologous* treatment. When UCB is used to treat a condition in a person other than the donor child it is referred to as *allogenic* banking. In the past, the public banks have carried out allogenic banking and the private banks have carried out autologous banking, although there may be occasions where both types of use are carried out by both types of banks.



Is It the Mother's or the Baby's?

UCB raises a number of interesting challenges for regulation. One of the major issues concerns the question of where UCB originates from: is it the mother or the child? Who is the donor? Primarily this is because the law is unclear as to whether the UCB is part of the mother or the child. Generally speaking, the law treats the umbilical cord as being part of the mother during pregnancy. For example, when pregnant women have been attacked, abruptions of their placentas have been considered as assault occasioning grievous bodily harm. This indicates that the placenta and umbilicus come 'from' the mother's body and therefore 'belong' to her and should be regulated by her choices.

On the other hand, the law also states that damage to the placenta or umbilicus causing injury to the child in utero might be considered a cause of death if the child is born alive but then dies from the injury. This view supports the argument that UCB comes from the child. It also has the benefit of being backed by the fact that the umbilicus is genetically identical to the child and not the mother.

The problem of the origin of UCB really colours our understanding of who should control what happens to UCB. Nor is it clear legally whether UCB falls within existing legal regimes under the Human Tissue Acts, as it is neither regenerative nor non-regenerative tissue.

Consent from Whom?

Who should be the person responsible for giving consent, and under what conditions should it be obtained? If UCB is considered to originate from the mother, decisions regarding its collection must be made by the mother and must be based on informed consent. Alternatively, if UCB is considered to be coming from the child, there is the added difficulty that parents must exercise their parental power to consent to donation on the child's behalf. In doing so, the law would arguably require them to act in the child's best interests. If this model were correct, both the mother and the father would have equal rights to consent to the donation and storage.

A number of issues then become apparent, such as whether the consent of both parents is required and what should happen when the mother and father disagree about whether the UCB should be donated and stored? A further complication arises in private UCB banking where services are often pitched at third parties to the birth, namely grandparents. If the grandparent is paying for the procedure, what say does that person have in the banking (if any)?

Property Rights

The use of UCB both therapeutically and in research has necessitated a re-evaluation of the ownership of this tissue in both ethical and legal terms. The discussion regarding whether cord blood is part of the mother's body or the child's is fundamentally a search for origins as

means for establishing a kind of 'ownership'. This is very similar to the logic of 'first possessor' claims where a person argues that they own something because they possessed it first. In contrast, an early paper on UCB collection suggested that UCB should have the same status as any donated organ or tissue, by which it was meant that it should be treated as being owned by the child, and this concept has since become broadly accepted in many countries. Recent English and Australian cases have recognised property rights over human tissue and these cases raised issues over the nature of the UCB donation. Is it a gift? A conditional gift? A trust?

Public and Private

The public/private nature of the UCB industry also creates challenges. Over time, the focus of both private donation with autologous donation and public banks with allogenic donation has begun to break down. The line between public and private banking is becoming increasingly blurred by pressure from both the private market and the public sector, forcing both private and public banks partially to adopt each other's practices. These new hybrid models of banking challenge the very nature of the public/private dichotomy and require us to rethink oppositional positions, particularly those taken against private banking. To that extent, the regulation of public and private banks also needs to be re-examined in light of the fact that the dichotomy is not as clear-cut as it previously appeared.

Going Forward — Multi-Disciplinary Research Based on Public Consultation

UCB banking raises a number of fascinating and complex issues about the interaction of law and medicine. The Centre for Health Governance, Law and Ethics and the Centre for Values, Ethics and the Law in Medicine are working together to unpack these challenging issues. In 2010 and 2011 the two Centres held a workshop and a conference, respectively, on the legal, ethical and social dimensions of UCB banking. A special issue of the *Journal of Law and Medicine* showcasing paper from the workshops was released this year. A qualitative study has also been completed and is the largest of its kind ever performed. Further regulatory reviews are planned, which we hope will be released in 2012. *jd*



Cameron Stewart (PhD 2002) is a Professor and Director of the Centre for Health Governance, Law and Ethics at Sydney Law School and Associate Professor at the Centre for Values, Ethics and the Law in Medicine, Sydney Medical School.

TIMEWARPs and FUTURESHOCKs: Great anniversaries in Australasian Bioethics

Whoever wishes to foresee the future must consult the past; for human events ever resemble those of preceding times — Machiavelli.

In 2013 Sydney Law School will host the Australasian Association of Bioethics and Health Law Conference:

11–14 July 2013, Sydney Law School, University of Sydney.

2013 is an auspicious year. It's been:

- 25 years since the Cartwright Inquiry into the New Zealand Cervical Cancer study;
- 21 years since the decision of *Roger v Whitaker* which enshrined the doctrine of informed consent into Australian law;
- 21 years since the High Court's decision in *Marion's Case* which transformed the nature of parental consent to medical treatment in Australia; and
- 18 years since the creation of the New Zealand *Code of Health and Disability Services Consumers Rights*.

What have we learned from these famous encounters between health, ethics and the law? Can we say that these interventions (and the ones that followed them) have improved the provisions of healthcare in Australia and New Zealand?

This conference will provide a forum for discussion of several core concerns within bioethics and health care law. Presentations are welcome on a wide variety of topics relating to:

- rights in healthcare;
- informed consent;
- health and disability;
- children, parents and healthcare;
- reproductive healthcare;
- special treatments;
- biomedical research ethics; and
- death and dying.

For further information, see www.aabhl.org



Australasian Association of
Bioethics & Health Law

The Clinical Ethics Resource wins another round of funding

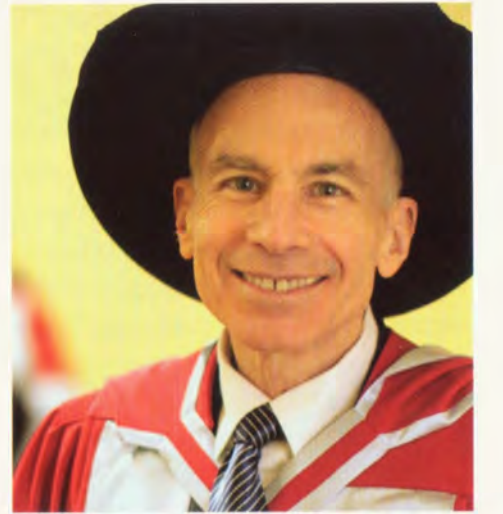
The Centre for Health Governance, Law and Ethics and the Centre for Values, Ethics and the Law in Medicine have recently received funding of \$30,000 per year for three years to run two web services: the Clinical Ethics Resource (www.clinicalethics.info) and the Ethics and Health Law News (www.ehln.org). Both services are free to the public and attract about 200,000 page views a year.

Log on to subscribe to the services and you can receive weekly notifications of the top 20 stories from around the world on biomedical ethics and health law.

Healing the System

Larry Gostin, Health Pioneer

Chris Rodley



At the age of 23, Larry Gostin was admitted to a hospital for the criminally insane in North Carolina. To its staff, he was an accused rapist there for an assessment of his competency to stand trial. In reality, he was a Duke Law School student posing as a patient to gather evidence about the facility as part of a US Department of Justice investigation.

Once inside the institution, he was shocked by what he observed: sweltering heat and flies, filthy conditions, spoiled food, and pervasive boredom from lack of stimulation. Perhaps surprisingly, it took just a few weeks for him to become acclimated to all those indignities: 'In the end I was just rocking in a chair looking out the window, completely defeated,' he recalls.

Larry Gostin's stay in the hospital was supposed to last less than a fortnight, but he was ultimately held for three months after the psychiatrists refused to verify him as sane, despite him telling the truth about why he was there. Eventually, he was released after falsely admitting to the crime to satisfy the demands of the doctors in charge.

But the young law student would be changed forever by his incarceration. 'It was a scary, dehumanising experience that allowed me to see and understand total institutions,' he says, referring to sociologist Ervin Goffman's term for facilities cut off from society. 'It made me understand vulnerability and disadvantage by experiencing it viscerally.'

Ever since, he has dedicated his career to using the law to improve conditions for society's most vulnerable, particularly by strengthening health systems. Today, he is the Linda D and Timothy J O'Neill Professor of Global Health Law at the Georgetown University Law Center, as well as a Professor of Public Health at the Johns Hopkins University. In May, he joined the Sydney Law School community when he was awarded an honorary Doctor of Laws in recognition of his achievements at a ceremony in the Great Hall.

Professor Gostin's time at the psychiatric hospital sparked a special passion for improving the status of mentally ill people. After graduating with his Juris Doctor from Duke, he moved to London where he served as legal director of the National Association for Mental Health and later became director of the British Civil Liberties Union, now known as 'Liberty'. He argued a number of landmark cases in the European Court of Human Rights, including one aimed at recognising the right of mentally ill people to vote. Professor Gostin also helped to draft the UK's *Mental Health Act*, which has since been emulated around the world.

On his return home to the United States, he played a prominent role in other important health initiatives. After the anthrax attacks that followed 11 September 2001, the White House commissioned Professor Gostin with leading the effort to draft a *Model State Emergency Health Powers Act*. The legal code gives authorities the power to prepare for major emergencies, from flu pandemics to bioterrorism attacks, and has been implemented at least in part by a majority of states across the US.



But it is in the global health arena that Professor Gostin hopes he will make his biggest impact. The enormous inequalities between citizens of the world pose an urgent moral crisis, he argues: a baby born in Africa currently has a life expectancy around 30 years less than one born in Australia or the United States, a situation he calls 'unconscionable'.

Unfortunately, whatever the international community is doing to reduce global health inequalities isn't working: 'We've had what they call the decade of global health, there's been vastly increased funding, the Gates Foundation has entered the field, celebrities like Bono have joined in the effort, yet the inequalities are still phenomenal.'

In response, Professor Gostin has proposed an ambitious solution: a governance framework for global health as powerful and robust as the World Trade Organization. 'There's no reason in the world why we can have a strong, enforceable global law in intellectual property, and have weak, soft, really ineffectual governance for health,' he says.

His proposal is for an international Framework Convention on Global Health, based on the concept of a universal right to health. Such a treaty would set out each country's responsibilities for the health of their own people, as well as joint international responsibilities for channelling more funds into global health. It would also coordinate the plethora of agencies working in the area and provide stronger leadership through the World Health Organization.

Underlying Professor Gostin's proposal is his conviction that global health reform must focus on investment in health systems and public health infrastructure, rather than trying to improve health 'disease by disease'. Current international health initiatives

often focus on research and prevention aimed at specific conditions, such as HIV or malaria. Instead, according to Professor Gostin, our priority should be on implementing programs that are proven to make people more healthy, such as sanitation, access to food and clean water, and strong health care systems.

There are already promising signs that Professor Gostin's proposal is gaining traction. Last year the UN Secretary-General, Ban Ki-moon, lent his support to the idea and the WHO Director-General, Margaret Chan, formally added the framework to the WHO's reform agenda. He has also attracted the support of an international network of civil society leaders and academics known as the Joint Action and Learning Initiative on National and Global Responsibilities for Health (JALI), who are advocating for the treaty and exploring other strategies for reforming global health.

Ultimately, according to Professor Gostin, it is law that must play the central role in improving public health, both in developing countries and closer to home. 'If you were to list the top public health achievements in the 20th century in the US, arguably all of them were brought about primarily or at least significantly by law,' he says, giving the example of vaccination, tobacco control and seatbelt laws.

We can and should use law to create societies more favourable to human health, he believes, whether that means regulations to improve the quality of food and ward off obesity, or tighter gun controls to prevent shootings such as the Colorado cinema massacre.

'It seems to me that the definition of public health law is the definition of law itself,' he says, 'and that is to create conditions in which people can be healthy and safe.' **jd**

US Health Reform Lives On, but for How Long?

On the morning of 28 June 2012, Americans waving flags and banners gathered outside the US Supreme Court to await its ruling in *National Federation of Independent Business v Sebelius*. The landmark decision would decide on the constitutionality of the *Affordable Care Act*, widely known as 'Obamacare'.

The stakes had never been higher. Obamacare aims to extend health cover to millions of uninsured Americans by expanding the government-funded Medicaid program and by imposing an 'individual mandate' on young, high-income earners to purchase insurance or else pay a penalty.

For progressives, it represents a once-in-a-generation chance for the US to take a major step towards universal health care. For its vociferous opponents in the Tea Party movement, Obamacare represents an attack by government on individual liberty and the right to choose one's own health care.

The Court's decision came as a surprise to both sides: it upheld the bulk of the Act, including the individual mandate, while striking down the provision which enabled the federal government to withhold Medicaid funding from states which refused to implement the reforms.

Professor Gostin was also surprised by the decision that morning. Not by the result — he had been one of the few legal experts predicting the Supreme Court would uphold Obamacare — but by the Court's reasoning. Rather than upholding the individual mandate based on the federal government's power to regulate interstate commerce, it based its ruling on the grounds that the mandate was actually a tax.

The wider implications of the Court's decision are troubling, according to Professor Gostin. 'There are two major ways that the government can regulate the public's health or social welfare,' he says. 'One is through its power to regulate interstate commerce, and the other is through so-called conditional spending, giving to the states as long as they obtain certain conditions.'

In its decision, the court undercut both of those historic powers, overturning nearly a century of jurisprudence, he says. 'That doesn't bode well for the Federal Government's ability to craft innovative welfare programs in the future.' Even so, he was delighted to see the court uphold Obamacare: 'It wasn't a complete win, but nevertheless, historic health care reform lives on until the presidential election.'

That election may pose another major roadblock for the reform process, Professor Gostin explains. If Mitt Romney is elected in November, the law would not necessarily be repealed; that would require a two-thirds vote in the Senate. 'But Romney would do everything he could do to at least gut it,' he says, such as by instructing the Internal Revenue Service not to make the collection of the tax a priority, so people could simply opt out of it. If the President is re-elected, a Republican Congress would not be able to repeal the law over his veto. But it could still derail the reforms by not funding parts of it or by curtailing the government's ability to implement it.

Regardless of who wins the election, there is also the risk that the wealthy Americans targeted by the individual mandate may prefer to simply pay the tax penalty and not buy health insurance, making the scheme unviable. 'But America is at last on the path to joining the league of civilised nations which at least nominally guarantee the right to coverage,' he says.

1962 Law Graduates Reunion

Celebrating 50 Years since Graduation



On 21 August 2012, a cocktail party reunion was held by former students of the University of Sydney Law School to celebrate their graduation on 10 April 1962.

Twenty-eight graduates attended. Twenty who would not have missed it but for compelling reasons and were unable to attend, sent apologies. There was excellent opportunity for graduates to renew acquaintances with alumni some of whom had not been encountered since graduation.

Sydney Law School made available the Faculty Common Room and adjacent facilities for the reunion. Alumni co-ordinator Greg Sherington gave a short tour of the faculty's library, main lecture theatre and other facilities. Graduates marvelled at the difference half a century had made since they completed study at the old now demolished law school buildings in the Phillip Street precinct.

Among the alumni who attended were The Honourable Brian Tamberlain who was, until he retired, a Justice of the Federal Court of Australia and has served as acting Justice of the Court of Appeal of the NSW Supreme Court. He is currently Deputy President of the Administrative Appeals Tribunal, and Justice Dr Jane Mathews AC, the first female Judge in NSW and the first female Judge of the Supreme Court of NSW. Jane was also a Judge of the

Federal Court of Australia and President of the Administrative Appeals Tribunal. Following mandatory retirement, Jane was re-appointed and currently serves as an acting Judge of the Supreme Court.

The Acting Dean of the Faculty, Greg Tolhurst, welcomed the graduates. The Honourable Murray Gleeson AC, recently retired Chief Justice of the High Court of Australia, proposed the toast to the Law School and spoke on the changes which have occurred in the intervening 50 years both in the Faculty of Law and in the legal profession.

The Honourable Michael Kirby AC CMG, also recently retired as a Justice of the High Court of Australia, seconded the toast and spoke on the way things were when the alumni were law students.

Graduates who have passed on were remembered. They included Justice Graham Hill who was a Judge of the Federal Court of Australia, Justice David Hodgson who was a Judge of the Court of Appeal of the NSW Supreme Court until his death earlier this year and Phillip King, who became the managing partner of Allan Allan & Hemsley.

The Reunion Committee consisted of Charles Curran AC (Chairman), David Ross (co-ordinator), Bill Henningham PSM, and Anthony Restuccia. *jd*



The Honourable Michael Kirby AC CMG

The Graduating Law Class of Sydney 1962

Privileged, Lucky, Unquestioning*

Hon Michael Kirby AC CMG[†]

On Tuesday 10 April 1962, nearly 100 young graduates were introduced to the ancient Chancellor, Sir Charles Bickerton-Blackburn, marking the conferral of their degrees of Bachelor of Laws. There was but one Law ceremony, held in the Great Hall. We were presented by the Acting Dean of the Faculty of Law, Professor David Benjafield: ever optimistic and joyful, officiating from his wheelchair.

Julius Stone, Professor of
International Law
and Jurisprudence



The University Medal, and first place in the honours list, was awarded to my school friend from Summer Hill Opportunity Public School and Fort Street Boys' High School, Donald Graham Hill. Also high in the list was David Hargraves Hodgson, then recently named as Rhodes Scholar for New South Wales. Each of them became fine advocates and distinguished judges.

The other top students were Brian Tamberlain and Murray Gleeson. Both carved out fine careers at the Bar and in the Australian judiciary, the latter rising to be successively Chief Justice of New South Wales and of the High Court of Australia; the former as a Judge of the Federal Court of Australia.

Fourteen of the graduating class were awarded honours; only four First Class. Attending recent law graduations at this University and others, one is struck by the huge increase of the number and proportion of top honours graduates. Can the quality have changed so much? Or have degrees become intolerable to paying law students consumers unless conferred with high honours? Two of the honours graduates in 1962 were women, Ruth Jones and Jane Matthews. In all, six of the graduating class were women. This is another proportion that has completely changed amongst today's law graduates. Happily there has now been a woman as a Dean of Law, Professor Gillian Triggs. We congratulate her on her recent appointment as President of the Australian Human Rights Commission. In our day there were no female law teachers, full time or part time, until Enid Campbell came to Sydney Law School in 1965, when our undergraduate years were over.

Memories of the Past

Although we are called the year of 1962, our actual years at the Sydney Law School began either in 1957 or 1958. By 1962, when we graduated, we had finished our undergraduate years. Those of us who had undertaken the six year BA, LLB course mostly began in 1958. This was the sixth year of the reign of Queen Elizabeth II. Her mother, Queen Elizabeth the Queen Mother, visited Sydney and New South Wales in 1958; as Prince Phillip was to do in 1962, for the Commonwealth Games in Perth. Royal tours were a feature of our youth.

The Governor General of Australia in 1962 was Viscount De L'Isle VC. Sir Eric Woodward was the Governor of New South Wales. Mr R G Menzies was in the 12th year of his second period of service as Prime Minister. A month before our graduation, the Australian Labor Party won a record 7th successive term as the Government of New South Wales. Mr Bob Heffron was Premier and Mr J B Renshaw was his Deputy.

The election of the Askin Coalition Government did not come until 1965. The Whitlam Federal Labor Government was not elected until December 1972. These were years of political and social stability, little change and much conservatism in Australian society: even self-satisfaction.

Our lectures were taken in the old *University Chambers* in Phillip Street. This was a building (since demolished) of six storeys. It abutted a more modern building, built in the 1930s, which opened onto Elizabeth Street. Only some floors of the new building were dedicated to the Law School. It provided little relief to the chronic lack of space for staff, student facilities and even basic lecture rooms. We became a wandering tribe of suppliants, in constant search of different venues for the early and late lectures that we attended.

The main venues for our lectures were two large lecture halls on the top floors of University Chambers, from which we could look across the street at the newly-erected Wentworth Chambers and see the busy barristers at work. This was where some of us hoped one day to be. Our lives were already closely intertwined with legal practice. At least by our second year, virtually all of us were undertaking articles of clerkship. We had been taken up to the Supreme Court by our master solicitor and introduced to the Prothonotary, or his Deputy, as a symbol of a fledgling association with legal practice. That link was to be deepened and strengthened by our years at the Law School and thereafter.

On level 3 of University Chambers was a small but powerful series of offices facing Phillip Street where dwelt the most famous scholar of the Law School of that time, Professor Julius Stone. Stone was to have a great influence on many of his students. At the time, he was a kind of antidote to the orthodoxy of 'complete and absolute legalism' preached by the justly famous Chief Justice of the High Court, and long term Justice, Sir Owen Dixon.

Wandering Tribes, Foolscap and Lord Denning

Our Law School notes were justly famous. They were produced, in the technology of that time, by cyclostyle roneoed process, some with blue and some with black ink. Normally, they were printed on both sides of cheap blotting-type paper, seemingly left over from wartime rations.

The Law School notes were provided to us by Mrs Gaunson. She had an office on the higher level of the new chambers abutting Elizabeth Street. Hers was an office of constant activity, made slightly more homely by the presence of her small dog to whom she was devoted. Somewhere in the same building was the Law School Library. It was extremely crowded, dark, multi-storied with metal ladders and seriously overheated. So much

* Edited version of the address to surviving members of the law graduates of the University of Sydney 1962, given at the New Law School, the University of Sydney, 21 August 2012. The full text is in the *Australian Bar Review*, vol 36.

† Justice of the High Court of Australia (1996-2009). President, NSW Court of Appeal (1984-96). Inaugural Chairman of the Australian Law Reform Commission (1975-84); President of the International Commission of Jurists (1995-8).

so that I quickly abandoned it and extended my peregrinations to the South West corner of the great reading room of the State Library of New South Wales, which was amply supplied with air conditioning, light and the major legal series. There, at a special desk, Warren Houghton, (subsequently to become the Director-General of the National Library of Australia) would tend to softly mumbled student demands.

Soon after we began our lectures in the Law School in 1958, we scattered ourselves, around the classrooms taking customary positions with regularity. In the front row, I can remember, some of our number took their seats, a few of whom were joining us in the first year of the five year part time course. These included Bronwyn Setright, later to be famous as the Hon Bronwyn Bishop, a Member of Federal Parliament and Minister in the Howard Government. Like John Howard himself, she did not graduate in 1962 but in the following year. Other 'front rowers' in my recollection were, Cyril Feilich, Louise Ferrier and Lillian Bodor, the latter two the more noticeable because they were women in a class which were still overwhelmingly male. Cyril Feilich was famous for introducing a huge tape recorder into the class so as not to lose a single word of the lectures.

In 1959, those of us who were later to graduate in 1962 entered upon our articles of clerkship. Our lives settled into a busy routine. We would arrive at the Law School for an hour long lecture at 8:30am. We would then hurry to our offices to undertake our duties in court or at registries or legal offices, only to return at 5pm and 6pm for evening lectures. It was a rigorous discipline of instruction. This was so because virtually all of the subjects were compulsory. Electives were extremely rare and few in number. The teaching of law in our day was thought to depend upon substantially rote learning of huge masses of information, designed to give the student a good grounding in virtually the total range of the law as it was practised in New South Wales at that time.

In our years, the common law predominated as the source of applicable rules. Our minds were substantially fixed on English judicial decisions. We had to learn these because, in all but a few cases governed by s 74 of the *Australian Constitution*, it was English judges in the Privy Council who constituted the final appellate court of Australia. This was why practising lawyers and legal offices displayed, in pride of place, the *English Reports*. And our courses of instruction were devoted to examining the reasons of the great judges of England of that era and before.

In 1958, Viscount Kilmer of Creich was the Lord High Chancellor of Great Britain. He was still in office in 1962. The greatest Law Lords of that era were Viscount Simonds, Lord Reid, the Scot, Lord Radcliffe and most beloved by most of the law students, Lord Denning. Denning was particularly interesting because of his prose style; his willingness to dissent on issues of moment; and his visits to the outposts of the English law, including Australia, where he was mobbed by the students. On one such visit, when he spoke at the Sydney University Union, where I was President, he signed a photographic portrait of himself which my father had procured from a newspaper. I still have that portrait in my chambers. It is inscribed with a bold hand 'Denning M.R.'

Our year was unusual for the large number of its members who would later secure judicial appointments. This was doubtless encouraged by the expansion of federal judicial posts; but also a measure of luck that came our way. We were a lucky generation. Our birthdates had placed us safely between the wars that had confronted earlier Australian law students and citizens. We were too young for the Java Sea and Korea. But we were too old for Malaya, Vietnam and later conflicts. Many of us had performed compulsory national service. Others had postponed that service, taking advantage of its later suspension in the fall

out over the failed campaign in Vietnam.

A few of us shared with another the obligation of attending and writing up notes on the compulsory lectures. Murray Gleeson and I did this from second year in 1959 until completion of the course in 1961. During our judicial service together, after 1988, we resumed the task of working together and sharing the work load. I am not aware of any other year, in any other Australian law school, that provided two members of the High Court of Australia from its numbers. Occasionally, when I have addressed Australian law students, I have told them to look to the left and look to the right and two of those they see may end up together on a Supreme Court, Federal Court or the High Court. Still the odds are against it. Particularly now that the number of law schools in Australia has expanded from 6, as it was in our day, to 33 today.

Not long after our law school days in 1965, the Law Council of Australia hosted the Commonwealth Law Conference in Sydney. In default of other suitable conference venues in those times, the opening ceremony assembled in the Sydney Town Hall before the huge pipe organ. All the judges of the emerging Commonwealth of Nations who had come to Sydney were dressed in their wigs and robes, most of them fashioned by Ede and Ravenscroft of Chancery Lane, London. These were years of Empire Day on 24 May and British hegemony in the law, world-wide. Statute law had not yet assumed its primacy. The English law and the English judges still dominated our imaginations. This is how it had been since the beginning of the Australian colonies. When we were taught, it was how it was expected to be for the indefinite future. I cannot recall any serious discussion, in my law school years, about an end to Privy Council appeals in Australia. We had seen the wrongs that had occurred in South Africa when that happened. Least of all was there any discussion of the end of a constitutional monarchy in Australia. The Queen's visits continued to draw rapturous crowds.

Before Kensal Green

Remembering these days of legal education is a pleasant experience, at least for me. But things are done differently now. Legal education has changed. Back in 1962, there was no discussion of feminist perspectives of law. Nor queer legal theory.

We have been lucky. We missed war service. We lived through stability and steady progress in Australia. We saw democracy at work, in our country and increasingly in the world. We saw the defeat of the two extreme global ideologies. We experienced progress for minorities — Aboriginals, people of different ethnicity, gays. And also for women. We know that there is more to be done. Perhaps we can still occasionally lend a hand.

The great reproach to us, as lawyers, is that, in 1958 to 1962, although we were mostly young and students, we were not questioning enough. We did not question the serious inequalities in the law faced by women. We did not castigate the lack of Aboriginal students and graduates amongst us. We never raised the denial of Aboriginal land rights. We did not challenge White Australia. We did not agitate for faster independence for colonial peoples. We did not — and I include myself — raise our voices for gay rights. Not at all. We did not ever ask our lecturers why these things were so. We were not questioning enough. Our discipline, our lecturers, our history and our legal philosophy mesmerised us into an unquestioning complacency. I do not believe that this is the case in Australian law schools today. I certainly hope not. This was the great defect of our generation of law students and lawyers. It took 50 years to shake it off.

So gathering together again we count our blessings. Amongst which was our education at the Sydney University Law School. *jd*

Penny Crossley and Lee Burns
with participants.



Sydney Law School Goes to Africa

**LET'S PROTECT OUR OIL
SECTOR FROM BLACK MAIL
AND PROPAGANDA.
IT IS SET TO BE A BLES
'INTELLECTUAL'**

In June 2012, Professor Lee Burns and Ms Penelope Crossley travelled to Monrovia, Liberia and Mahe, Seychelles to teach the introductory component of the Sustainable Management of Revenue Flows in the Extractive Industries Course funded by AusAID. Across two weeks, this course was attended by 44 government officials and civil society organisations from Togo, Liberia, Cote d'Ivoire, Sierra Leone, the Seychelles and Malawi, active in the extractive industries.

Professor Burns taught mining taxation law, with a special emphasis on mining resource rent taxes, while Ms Crossley taught the participants about the legal frameworks in the sector, and how to negotiate international contracts in the extractive industries to ensure sustainable development. Some highlights included:


- a presentation from Mr Roosevelt Simoke, Director of Tax Appeals, Ministry of Finance, Liberia, during the Mining Tax Law sessions; and
- a presentation from Mr Samson Tokpah, Head of Secretariat, Liberia Extractive Industries Transparency Initiative (LEITI) during the Contract Negotiation sessions.

It was particularly pleasing to see a number of participants from civil society organisations, including LEITI, the Green Advocates, the

Committee for Peace and Development Advocacy, the Rural Human Rights Activists Programme and the Center for Sustainable Human Development.

As the first sectoral forum in Liberia since the Civil War, the involvement of these civil society organisations, the Ministry of Mines, the Ministry of Lands, the Ministry of Finance and the Environment Protection Agency and the representatives from the neighbouring countries led to passionate debate. This provided stakeholders with a valuable opportunity to express their views on how to improve the sector, and facilitated the formation of networks among these groups.

A number of the participants have been selected as AusAID Fellows to attend the full course in Australia, taught in conjunction with the Graduate School of Government. Their skills have benefited and will do so further with training in the areas taught by Professor Burns and Ms Crossley, as well as in Environmental Law and Corporate Social Responsibility with Ms Susan Shearing, Leadership Skills with Professor Geoff Gallop, and 'Train the Trainer' with Associate Professor Lesley Harbon from the School of Education.

As part of the Law School's ongoing involvement, in September 2012, Professor Burns and Ms Shearing taught in Ethiopia. 



Suing for Change

Janine McIlwraith

As a plaintiff's lawyer, I generally ask clients early in our first meeting what it is they hope to achieve by bringing a medical negligence compensation claim against the doctor or hospital allegedly responsible for their injury. Most people say words to the effect: 'I don't want this to happen to anyone else'.

A clinician involved in an adverse event is very often profoundly affected by the incident, especially where that incident may have resulted from a momentary lapse of concentration or uncharacteristic departure from a normally very high standard of care. Whether an adverse outcome is in fact the result of negligence or not, many clinicians alter their clinical practice after being involved in the care of a patient who has suffered a poor outcome from treatment.

An adverse event in a hospital can spark system-wide change. Public hospitals have quality assurance committees which conduct investigations into serious incidents and produce root-cause analysis reports that are intended to identify the source of the problem and any methods or policy and procedure changes that could prevent a recurrence of the same type of error.

But, lightning rarely strikes the same place twice and one clinician's or one hospital's awareness of a potential problem and adoption of preventative measures is just that. It does not necessarily extend to other hospitals or the thousands of other doctors in clinical practice.

What is the scope of litigation as a means of changing clinical practice? It is common knowledge that by far the majority of claims for medical negligence are settled prior to hearing. It is only claims that are novel in their facts or are in some way pushing the boundaries of the law that one generally sees proceed to hearing and judgment. Running a case to hearing is, for a plaintiff particularly, an arduous, expensive and risky process. It would be fair to say that while most plaintiffs relish the idea of their day in court, most would rather their case was not the one testing the limits of the law.

It is common knowledge that by far the majority of claims for medical negligence are settled prior to hearing.

In NSW, the *Civil Liability Act 2002* sets out the test for the standard of care for professionals. Under s 5O, a professional is not negligent if it is established that they acted in a manner that (at the time the service was provided) was widely accepted in Australia by peer professional opinion as competent professional practice. However, peer professional opinion cannot be relied upon if the court considers that opinion is 'irrational'.

It is perhaps cases that are apt to argue current clinical practice as irrational that have the most scope to change clinical practice on a nationwide scale. As identified by the *Review of the Law of Negligence*,¹ upon which the *Civil Liability Act* was based, it would be rare to identify treatment that is in accordance with an opinion widely held by a significant number of respected practitioners and yet irrational. Thus, these cases are not very common, and I am unaware of any case since the introduction of the *Civil Liability Act* in which there has been judgment finding that the peer professional opinion sought to be relied upon was irrational.

The Review of the Law of Negligence identified the case of *Hucks v Cole*² as an example of such a rare situation, which might satisfy the 'irrational' test that was proposed. In that case, Sachs LJ stated:

... the onset was due to a lacuna between what could easily have been done and what was in fact done. According to the defence, that lacuna was consistent with and indeed accorded with the reasonable practice of other responsible doctors with obstetric experience. When evidence shows that lacuna in professional practice exists by which risks of grave danger are knowingly taken then, however small the risks, court must examine that lacuna particularly if risk can be easily and inexpensively avoided ...

In my own practice, there is one category of claim that stands out as a potential platform for an argument of this nature: claims relating to the use of the antibiotic Gentamicin.

Gentamicin is an aminoglycoside antibiotic particularly effective in treating gram-negative organisms. It is relatively cheap and widely available, particularly in hospital settings. Unfortunately, it carries with it a well-known and documented risk of vestibular damage, which when realised is quite debilitating, severely damaging a person's balance mechanisms. When it was first introduced in Australia decades ago it was relatively unique in its efficacy, efficiency and affordability. Importantly however, today there are other comparable alternatives in most circumstances.

There has been quite a bit of media attention and professional discussion in recent months concerning the use of Gentamicin. This has perhaps been fuelled by the case of *Freeman v Australian Capital Territory*, commencing in April in the ACT Supreme Court, being the first case in Australia to be tried concerning its use. The case's commencement coincided with the publication in the *Medical Journal of Australia* of an article by Professor Halmagyi, who just happened to be an expert witness in the case. Halmagyi is of the view that Gentamicin-induced vestibulotoxicity can occur at any dose and that that particular antibiotic should be given only when there is no safer alternative. He also states that the patient should be warned of the risks before being treated with Gentamicin.³

The expert evidence put forward by the defendant in many of these claims is that it is common practice to use Gentamicin in the way that it was used in the specific case. However, might this be inviting the 'irrational' exception to the widely-accepted defence? To paraphrase Sachs LJ, might it be said that where the evidence shows that the use of Gentamicin in professional practice exists by which risks of grave danger are knowingly taken then, however small the risks, the court must examine that use, particularly if risk can be easily and inexpensively avoided. In some circumstances, the benefit of the use of Gentamicin might be found to outweigh the risk and thus the use might be warranted, for example, in the case of life-threatening infection. In other circumstances, such as where Gentamicin is used for prophylaxis prior to surgery, it may not be considered rational to expose a patient to the risk of vestibulotoxicity. Alternatively, it might be that a court would decide the patient has to be the ultimate decision-maker and informed consent needs to be obtained before the administration of Gentamicin. There are many lawyers, doctors and patients who would welcome the Court's exploration of the 'irrationality' of the continued use of Gentamicin in the hope that such an inquiry would result in the alteration of current widespread clinical practice.

The effectiveness of litigation in initiating change is perhaps related more to the stresses it creates on the various players than on any judgment the client may hope will be delivered.

Ultimately however, returning to my initial musing, I generally advise my clients that, while theoretically litigation can be a tool for altering clinical practice, in most cases it is at best blunt. The effectiveness of litigation in initiating change is perhaps related more to the stresses it creates on the various players than on any judgment the client may hope will be delivered. Some cases do undoubtedly spark change. The community at large, as health care consumers, benefits from such cases, and for that reason, plaintiffs and their lawyers must be encouraged to continue to bring such claims before the courts so that the courts have the opportunity to appropriately influence the determination of the standard of health care consumers are entitled to receive. *jd*



Janine McIlwraith (LLM 2005) is a health lawyer and co-author of *Health Care and the Law* and *Australian Medical Liability* in addition to having edited several chapters of *Halsbury's Laws of Australia* focussing on professional negligence in the health arena. She currently practises law at Catherine Henry Partners, Newcastle. The views expressed in this article are her own, and do not necessarily reflect those of her firm or others.

1 See <http://www.revofneg.treasury.gov.au>.

2 [1993] 4 *Medical Law Review* 393.

3 (2012) 196 (11) *Medical Journal of Australia* 701-4.

Farewell Gillian Triggs

Professor Gillian Triggs was farewelled at a cocktail reception at Sydney Law School on 27 July, as she left her role of Dean to become the President of the Australian Human Rights Commission. This is an edited version of her speech.

Since the announcement of my new appointment, I have been almost overwhelmed with kind letters and emails wishing me well in my new position. It is of course a wonderful chance for an international lawyer to put some legal principles into practice. These are certainly complex and demanding times and I very much look forward to the challenge.

I have been deeply honoured by the opportunity to work with you all as Dean and to be part of this great university and dynamic law school. I arrived in 2007 as a foreigner from that other place down south and was nonetheless warmly welcomed. The last five years have been very happy ones.

I am especially grateful for the rare opportunity as a Dean to be part of the move to this beautiful building. It is one of the tenets of legal practice in big law firms that you should not discuss client

matters in the lift, as you never know who is listening. Shortly after moving into this building, with its lime green sofas and flowers at the information desk, I was in the lift and overheard one law student say to another, 'this new Dean has really made a difference to the law school.' The other responded, 'Yes, it's a woman's touch!' I took this as a compliment.

The last five years have been ones of significant change for the university and the law school. We have responded to the globalisation of law and legal education; we have internationalised the curriculum, adopted the Juris Doctor degree, created new programs including those in social justice, clinical education, and law and development, with new units in global energy and resources law, and banking and finance.

This is a great faculty and I believe it will go from strength to strength as one of the leading global law schools in the world.



South-East Asia Winter School



In July 2012, around 20 Sydney Law School students travelled to both Indonesia and Malaysia on our inaugural South-East Asia Winter School. The course was administered by the Sydney law school and our two in country partners: the Law Faculty, Gajah Mada University in Yogyakarta, Indonesia; and the Ahmad Ibrahim Kulliyah School of Laws at the International Islamic University in Kuala Lumpur, Malaysia. Lectures were held on the campuses of these law schools English and presented in English. Under the guidance of two Sydney academics, Dr Simon Butt (Indonesia) and Dr Salim Farrar (Malaysia), sessions were led by academics from both institutions and supplemented by talks from senior

legal practitioners and government officials (including a current Solicitor General and retired Chief Justice). The course aimed to provide students with an introduction to the legal systems of both countries, with emphasis on features of those systems which differ from the Australian and other common-law legal systems.

The course was very well received by students, who enjoyed the challenge of learning about the complex legal systems of Indonesia and Malaysia, combined with interesting visits to various sites of legal and cultural significance. These included Indonesian and Malaysian general and Islamic courts, prisons, financial institutions, human rights commissions, active volcanoes and temples.



ALUMNA TO PURSUE POLITICAL SCIENCE DOCTORATE

Fiona Cunningham (LLB 2011) has received a highly competitive fellowship to undertake a PhD in political science at the Massachusetts Institute of Technology (MIT). Fiona will commence her studies in September and the cohort represents 10 to 15 students from more than 400 applicants, with Fiona being the only Australian.

Fiona was also offered fellowships in political science at Cornell University (Ithaca New York) and George Washington University (Washington, DC).

'I am planning to pursue research interests in international law and institutions, Chinese foreign policy and international security, ideally at the confluence of all three looking at China's approach and responses to the laws and institutions that govern international security,' she said. 'All three schools are leading centres of scholarship on these areas, which made it quite difficult to decide among them! I owe a debt of gratitude to Professor David Kinley, who supported my countless applications for both graduate study and provided excellent advice - his mentorship was essential to my success.'

Fiona served as the Vice-President (Education) of both SULS (2010) and the Australian Law Students' Association (2009-10), was a member of the Student Editorial Committee for the *Sydney Law Review* (2010), a volunteer editor for the *Australian International Law Journal* (2009) and won an academic merit prize in 2010.

QUEEN'S BIRTHDAY HONOURS

Alumni and friends of Sydney Law School were recognised in the latest round of Queen's Birthday Honours, announced on Monday 11 June 2012.

The Hon Gareth Evans, AC QC (LLD 2008): for eminent service to international relations, particularly in the Asia-Pacific Region as an adviser to governments on a range of global policy matters, to conflict prevention and resolution, and to arms control and disarmament.

John Carlson AM (LLB 1970, GradDipJur 1971): for service to public administration, particularly in the areas of nuclear non-proliferation and disarmament, and to the development of international safeguards policy.

His Hon Judge Kenneth Taylor AM RFD (LLB 1971): for service to the judiciary, to the law, and to the community through contributions in the areas of privacy, freedom of information, and in health and patient care matters.

Alumni and Student News

Dr Phillip Tahmindjis AM (LLB 1975): for service to the international community, and to the law, as a contributor and advocate for the promotion and protection of human rights.

Carl Reid OAM (LLB 1971): for service to the Jewish community, particularly through contributions to the management of schools and through the United Israel Appeal of New South Wales.

Colonel Leslie Young OAM (DipCrim 1987): for service to veterans and their families.

Professor Peter Singer AC: for eminent service to philosophy and bioethics as a leader of public debate and communicator of ideas in the areas of global poverty, animal welfare and the human condition.

Mrs Alice Spigelman AM: for service to the community as an advocate for human rights and social justice, particularly for women and refugees, and through contributions to cultural organisations.

VALE THE HON DAVID HODGSON AO (1939-2012)



Sydney Law School mourns The Hon David Hodgson AO (BA 1959, LLB 1962), former judge of the Court of Appeal of the Supreme Court of New South Wales, who died on 5 June 2012.

David Hodgson was educated at Sydney Grammar School, and graduated with degrees in Arts and Law from the University of Sydney, the same year as fellow judges Murray Gleeson

and Michael Kirby. He was also a Rhodes Scholar, attaining a DPhil at the University of Oxford. In 1962 he served as associate to High Court judge Sir Victor Windeyer. He was admitted to the Bar in 1965, and was appointed Queen's Counsel in 1979.

He was appointed as a Judge of the Supreme Court in 1983, and was Chief Judge in Equity from 1997 to 2001, then being appointed to the Court of Appeal. David Hodgson also served as a Commissioner of the New South Wales Law Reform Commission part-time, and was assistant editor of the *Australian Law Journal* from 1969 to 1976.

RICHARD BUTTON (BA 1982, LLB 1984) APPOINTED TO SUPREME COURT OF NSW

Sydney Law School congratulates The Honourable Justice Richard Button on his recent appointment as a Judge of the Supreme Court of New South Wales.

After graduation from his Sydney LLB, Mr Button was admitted as a solicitor in 1984 and was called to the Bar in 1989. Following two years in private practice, he was appointed a Public Defender, where he remained until being sworn in as a Judge of the Supreme Court on 12 June 2012.

From 1996 until 1998 he was seconded as Director of the Criminal Law Review Division of the NSW Attorney General's Department, where he was involved in state and federal reform. Mr Button was appointed Senior Counsel in 2005 and was appointed one of two Deputy Senior Public Defenders in 2010 after leading a defence team in the Supreme Court terrorism trial at Parramatta in 2008 and 2009.



PRESTIGIOUS OXFORD SCHOLARSHIP

Congratulations to Naomi Oreb (BA 2008, LLB 2010) on winning the Vinerian Scholarship for first place in the Bachelor of Civil Law (BCL) exams at Oxford University. Naomi undertook four subjects and gained first place in two — receiving two additional prizes: the Clifford Chance Civil Procedure Prize and the Law Faculty Prize for Criminal Justice and Human Rights.

While at Oxford, Naomi attended Magdalen College where she also rowed for Magdalen, winning 'blades' in the Torpids bumps races. She previously worked as an associate at the High Court.

Previous winners of the Vinerian Scholarship include the former Governor-General, Sir Zelman Cowen, AK, GCMG, GCVO, QC, PC; The Hon Justice John Dyson Heydon, AC (BA 1964, LLB 2007) of the High Court of Australia; and The Hon Justice Patrick Keane, Chief Justice of the Federal Court of Australia.

VALE FRANK WALKER QC (1942–2012)

Sydney Law School mourns alumnus Frank Walker QC (LLB 1966, LLM 1970), former NSW Attorney General, who died on 12 June at the age of 69. Mr Walker made an outstanding contribution to law reform, Indigenous issues and social justice on a state and national level and was a prominent advocate for schizophrenia sufferers.

Appointed NSW Attorney General in the Wran Government at the age of 34, Mr Walker went on to become a Federal Minister, and later served time on the Workers Compensation Tribunal, the Dust Diseases Tribunal and as a NSW District Court Judge. He was also President of the Schizophrenia Fellowship. He formally retired in 2006.



Mr Walker was farewelled with a state funeral at the Sydney Conservatorium of Music, followed by a private burial.

ENDEAVOUR FOUNDATION ENDOWMENT FUND RESEARCH AWARD

Sydney Law School would like to congratulate lecturer and PhD candidate, Linda Steele, on winning the Endeavour Foundation Endowment Fund Research Award. Upon receiving the award, Linda said it will go towards her research about how the criminal law mechanism of diversion from the criminal justice system can challenge the criminalisation of people with cognitive disability in the criminal justice system.

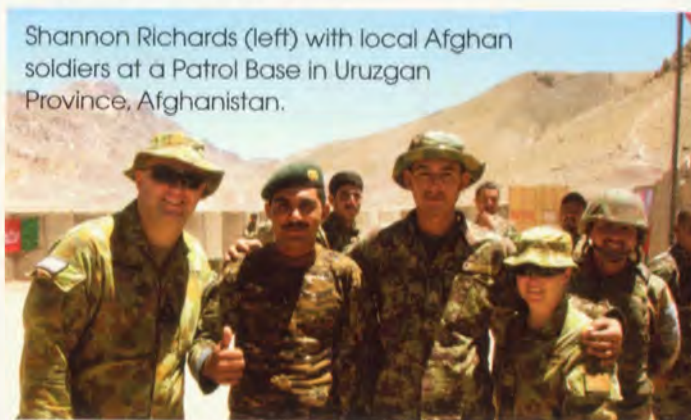
Alumni and Student News

'The overrepresentation of, discrimination against and vulnerability of people with cognitive disability in the criminal justice system continue to be significant issues across Australia,' she said.

Linda said there is an absence of data on the broader social marginalisation of people with cognitive disability who have been the subject of diversion.

'With the Endeavour Foundation Endowment Challenge Fund grant and after gaining ethics approval, I will obtain data from a large dataset created in an ARC Linkage Project: People with mental health disorders and cognitive disabilities in the NSW criminal justice system led by researchers at UNSW (Chief Investigators include Professor Eileen Baldry and Dr Leanne Dowse). Working with the researchers at UNSW I will construct case studies on the criminal justice and human service pathways of individuals, all of whom have been in prison, have cognitive disability, and who have been subject to diversion at some point in their lives.'

Linda has been the recipient of an Australian Postgraduate Award (2009–12), the Longworth Scholarship (2012), the John O'Brien Memorial Scholarship in Criminal Law and Criminology (2009, 2010) and the Cooke, Cooke, Coghlan, Godfrey and Littlejohn Scholarship (2012).



LIEUTENANT SHANNON JAMES RICHARDS, RAN (LLB 2002, LLM 2012)

Shannon is currently on deployment with the Australian Defence Force as part of OPERATION SLIPPER (Australia's military contribution to the International Security Assistance Force (ISAF) in Afghanistan). He was selected earlier this year to deploy on OP SLIPPER as the personnel aide (aide de camp) to Major General S L Smith AM, the National Commander of Australian Forces in the Middle East. He has been deployed since March and is due to return to Australia in October.

Shannon joined the Royal Australian Navy on a full-time basis in 2008 as a Legal Officer after working as a corporate lawyer in Sydney for six years at Minter Ellison and Investec Bank. On his return, he will take up the posting of Assistant Fleet Legal Officer at Fleet Headquarters, Garden Island, Sydney, where he will advise Command on military discipline, administrative and operations law issues.

SHARING OUR ALUMNI NEWS

We are always keen to hear from members of the Sydney Law School alumni community with news of new appointments, special projects, reunions and anything else you think may be of interest to your peers. To let us know your news, contact the Alumni Relations Officer: law.alumni@sydney.edu.au

ALTA Conference

In July 2012, Sydney Law School hosted the annual Australasian Law Teachers Conference.

The theme of the conference, *Legal Education for a Global Community*, reflects the Law School's commitment to delivering truly global and transnational legal education.

It has been many years since we have hosted this important conference, as our Phillip Street quarters lacked the capacity to cater for an event of this scale. However, our current, architecturally-awarded home on the University's main campus provided more than 170 legal educators, researchers and publishers from around the world with an appropriate environment. Delegates attended from New Zealand, Fiji, Papua New Guinea, USA, Hong Kong, Russia, Singapore, South Africa and Spain.

'...globalisation now affects everything that we do, in every sphere of what we do ...'

A visiting delegation of 23 Law Deans from across China was delighted to attend the opening keynote presentation by the Hon Kevin Rudd. 'It's an impressive representation from our friends from China,' Mr Rudd commented. The arguments he presented neatly encapsulated the conference theme:

...globalisation now affects everything that we do, in every sphere of what we do ... in Asia we find the full bloom of globalisation in the 21st century ... [t]here is, I believe a large opportunity for this country, Australia as the western country within Asia, to become a greater and greater repository of the knowledge of Asian law and the knowledge of Chinese law in particular.

... [i]n the realm of international public law ... there is a wider argument for Australia's engagement as well, in the unfolding doctrines of international humanitarian law and most controversially in the area of the Responsibility to Protect.

Delegates enjoyed plenary presentations by members of the judiciary (Justice Virginia Bell, Justice Michael Slattery and Justice James Allsop), the Australian Academy of Law (Justice Ronald Sackville, Professor George Williams and Dr Sarah Pritchard), and from fellow academics (Professor Mitch Bailin, Georgetown, and Professor Michael Coper, ANU). More than 110 papers were presented in 36 disciplinary interest group sessions, along with vital professional development workshops.

The ALTA 2012 conference was an exciting and thought-provoking meeting. It was a highly successful event which the Faculty was proud to host. The 2013 conference will be hosted by the ANU College of Law. **jd**



Chloe Wyatt (Conference Organiser), Rita Shackel, Fiona Burns, Kevin Rudd, Susan Shearing, Arlie Loughnan And Gillian Triggs.



Getting Involved – SULS Leads the Way

SULS News by Claire Burke, President

An article published in a British newspaper recently emphasised the fact that you need more than just a law degree to be a good lawyer. The author lamented that too many law graduates have no experience outside the law, entering the profession with a purely academic understanding of principles, and not enough appreciation of the facts.

While every student has another degree to add to their education, SULS exists to give students opportunities which don't fit within their formal studies. Some of these enrich university experience, and others help bridge the gap between university and the workforce. Both are vital in producing graduates who are interested, interesting and capable.

This year, SULS has implemented new structures to encourage students to take part in law reform committees, allowing those students with a passion for access to justice and legal reform to pursue their interests as well as to make lasting connections with young and active members of the profession.

In a very different sphere, we've run a lot of sports this year, including entering a team in City2Surf to raise money for headspace, the National Youth Mental Health Foundation. The team caught up in the week before the race to pick up their t-shirts, meet each other and compare fundraising targets. Some of these runners were facing an active couple of weeks, representing SULS in the Pharmacy-Law charity rugby match and Intervarsity Sports Day. In October, we will host the University of Queensland Law Students' Society rugby team, after sending

our netball and rugby teams to Queensland in 2011.

Finally, we have had another remarkable year of competitions. After expanding our introductory series to provide more practical advice to students interested in mooting and skills competitions, we probably have the largest internal competitions program of its kind in the country. This year, we have investigated new intervarsity opportunities for our students, and will host the first intervarsity Equity Moot at Sydney Law School, presided over by Justice Gummow of the High Court. We sent a delegation of competitors to the annual Australian Law Students' Association (ALSA) Conference, with great success. Both mooting teams progressed to the semi-final stage, and Robert Pietriche was named Best Speaker in the International Humanitarian Law Moot. The end of the year will bring the second annual National Women's Moot, supported by the NSW Young Lawyers Committee of Law Students' Societies. This will be hosted in Sydney again, and will again be primarily organised and coordinated by SULS members.

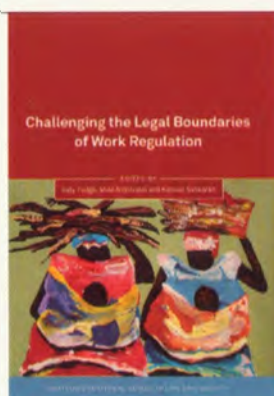
The students who get involved in everything that SULS can offer — not to mention the students who volunteer to run the programs themselves — are really making the most of their degrees. Sydney Law School is an excellent academic centre, but it is also home to an active student body, whose members take up numerous opportunities to run and participate in diverse programs throughout the year in addition to their many other responsibilities. *jd*



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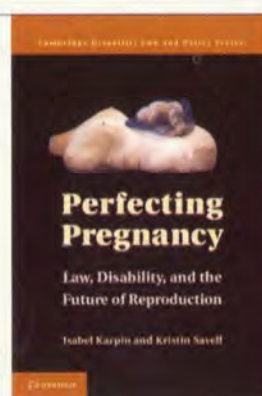


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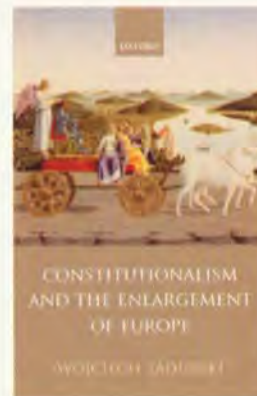
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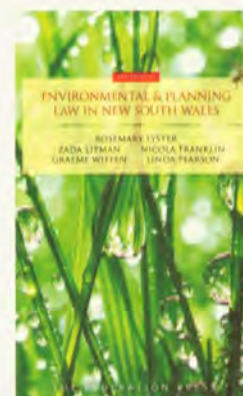
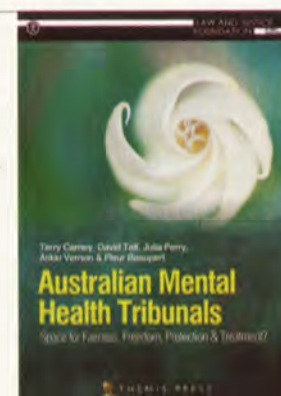
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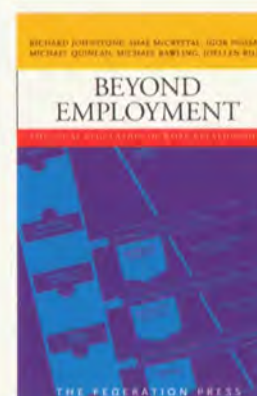
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