

ACLM 2022 ANNUAL SCIENTIFIC MEETING & AWARDS DINNER

From the Cradle to the Grave: *Beginning and End of Life Legal Issues*

15 October 2022 | Athenaeum Club Melbourne & Online



Program

9:00 am	DR ADAM GRIFFIN President's Welcome
9:05 am	MAURICE WALLIN ADDRESS: GUEST: PROFESSOR CAMERON STEWART Brain Death and Pregnancy: Is there a jurisdiction for postmortem gestation?
9:45 am	GUEST: DR NICOLE WOODROW Abortion and the Law in Australia and America: A clinician's perspective
10:15 am	PROF. MIKE O'CONNOR AM & GUEST: PROF. ARLIE LOUGHNAN Calming Down the Diagnosis of Multiple Infanticide
11:00 am	<i>Morning tea</i>
11:30 am	DR JOHN GOLDENRING (REMOTE) The Brain Life Theory: Towards a consistent biological definition of humanness
12:00 pm	GUEST: PROF. IAN FRECKELTON AO QC Stillbirths in the Coronial Jurisdiction
12:30 pm	DR CRISTINA PELKAS Wills, Estates and End of Life Wishes: The erosion of the lawyer's role in preparing our patients for loss of capacity
1:00 pm	<i>Lunch</i>
1:45 pm	PROF. ROY BERAN & GUEST: PROF. JOHN DEVEREUX Withdrawal of Treatment v Insistence on Futile Treatment: Legal considerations
2:30 pm	GUEST: MR SCOTT DAVISON The Doctrine of Double Effect and Potential Criminal Liability of Medical Practitioners in Australia
3:00 pm	DR BEVERLEY FERRES Legal and Ethical Issues at the End of Life
3:30 pm	MR MATTHEW BOISSEAU Guardians and the Power to Detain
4:00 pm	<i>Afternoon tea & ASM end</i>
4:15 pm	ACLM Annual General Meeting - ACLM members only
5:15 pm	<i>AGM end</i>
7:00 pm	AWARDS DINNER - LIVE only Formal dinner, presentation of College awards with guest speaker: PROF. JOHN DEVEREUX
10:00 pm	<i>Dinner end</i>

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Speakers & Abstracts

PROFESSOR CAMERON STEWART

*Professor of Health, Law and Ethics, The University of Sydney Law School
BEc LLB (Hons) (Macquarie) GradDipJur GradDipLegalPrac (College of Law) PhD (Sydney)
ACLM Honorary Fellow*



MAURICE WALLIN LECTURE

Brain Death and Pregnancy: Is there a jurisdiction for postmortem gestation?

This paper examines a recent decision of the Supreme Court of the Australian Capital Territory which dealt with a dispute concerning a brain dead pregnant woman and whether treatment to sustain her body should have been continued to save the life of her fetus. The paper compares the case to other cases from overseas jurisdictions to examine the question of whether there is any jurisdiction that might authorise the continuation of care in such circumstances.

Biography

Professor Cameron Stewart is a member of Sydney Health Law and an associate member of Sydney Health Ethics, Sydney Medical School. He has degrees in economics, law and jurisprudence. He was Acting President of the Australian and New Zealand Institute of Health Law and Ethics in 2008-2010 and was the Vice-President of the Australasian Association of Bioethics and Health Law from 2010-2013. Cameron is also an Honorary Fellow of the Australian College of Legal Medicine and a Fellow of the Australian Academy of Law.

DR NICOLE WOODROW

*Consultant Obstetrician and Gynaecologist / Ultrasonologist,
Abortion Services Clinic / Fetal Medicine Unit / Imaging Department, Royal Women's Hospital, Victoria
MBBS MRCOG FRANZCOG DDU COGU MBioeth MHLtMedLaw*



Abortion and the Law in Australia and America: A clinician's perspective

The US Supreme Court in *Dobbs v Jackson Women's Health Organisation* June 2022 overturned the constitutional protection given to a woman's right to access abortion established in *Roe v Wade* >50 years ago. This significant change in reproductive rights had followed decades of legal barriers imposing limits to access to abortion in many US States. During this period, Australia evolved from treating abortion as a criminal matter to a matter of healthcare. This presentation will focus on the different approaches to regulation and how they impact on pregnant women and the health care workers who care for them.

Biography

Nicole is a senior obstetrician and gynaecologist, specialising in ultrasound and fetal abnormality. She has worked on the frontline in women's health through significant changes in abortion law in Australia. She also holds a Master of Bioethics and a Master in Health and Medical Law. She has chaired major industry groups in Australia in obstetrical and gynaecological ultrasound and has various publications in medicine, bioethics and law.

PROFESSOR MIKE O'CONNOR AM

*Professor of Obstetrics & Gynaecology, School Of Medicine, Western Sydney University
AM MD (Syd) MHL MForensMed(Monash) DCH DDU FRCOG FRANZCOG
ACLM Fellow & Council Member*



Calming Down the Diagnosis of Multiple Infanticide

(Co-presenting with Professor Arlie Loughnan)

Infanticide, which is the killing of a child less than 12 months old by the biological mother whose balance of the mind, at the time of the offence was disturbed from the effect of giving birth to that child or from the effects of lactation relies on an archaic assumption that women during childbirth, puerperium and lactation become 'unhinged'. There is little evidence to support that contention. The current incidence is <2.1 per 100,000 births. In many cases the differential diagnosis lies between Sudden Infant Death Syndrome and deliberate killing by asphyxiation. The pathological findings in SIDS infants are by its very nature nonspecific and incidental findings such as low-grade chronic inflammation, intra-alveolar hemorrhage, and hemosiderin deposition may not be conclusive. Smothering is almost impossible to prove as the infant will almost never show conjunctival haemorrhage (petechiae) or other signs that may be seen in strangulation. The Folbigg case of 4 infant deaths which resulted in conviction and a sentence of 40 years (commuted) has raised interesting new evidence regarding DNA findings of a CALM2 protein mutation (G114R) in the 2 girls & the mother (known to cause sudden fatal arrhythmias) and Bassoon (BSN) mutations in both boys which causes early lethal epilepsy in mice. Given the difficulties of differentiating SIDS from infanticide by smothering it raises the question of whether a conviction of infanticide is beyond reasonable doubt.

Biography

Mike O'Connor is Professor of O&G at Western Sydney University and a Visiting Obstetrician & Gynaecologist at The St George Hospital, Kogarah, and St George Private Hospital, where he is Chairman of the Patient Care and Clinical Review Committee. He is a Conjoint Senior Lecturer at UNSW in the Division of Women's and Children's Health and Lecturer at Sydney University. From 1981-1983 he was Medical Superintendent at the Women's Hospital (Crown St.) in Sydney. For 6 years Mike O'Connor was a Federal Councillor of the Royal Australian & New Zealand College of Obstetricians & Gynaecologists, representing NSW and served as Vice President of the College from 2002-2004. His College work included the development of an Indigenous Health Worker training program in antenatal care, adult and neonatal resuscitation courses as well as courses on the management of sexual assault. He established the Chapter of Military O&G in the RANZCOG and is its Chairman. Mike O'Connor was awarded the Gold Medal of the RCOG at the MRCOG exams in 1975 and in 1982 he was awarded the degree of Doctor of Medicine (Sydney University). He holds Diplomas in Diagnostic Ultrasound & Child Health. He is an active member of the ACLM, the ASCCP and the ASUM. He has a Master's degree in Health Law from Sydney University and a Master's degree in Forensic Medicine from Monash University. He acts for both Plaintiffs and Defendants as an expert witness. He is a section editor for the Journal of Law and Medicine. In 2009 he was created a Member of the Order of Australia in recognition of his longstanding work in Indigenous Health.

PROFESSOR ARLIE LOUGHNAN

*Professor of Criminal Law and Criminal Law Theory, University of Sydney Law School
BA (Hons), LLB (Hons) (Sydney), LLM (NYU), PhD (Lond)*



Calming Down the Diagnosis of Multiple Infanticide

(Co-presenting with Professor Mike O'Connor)

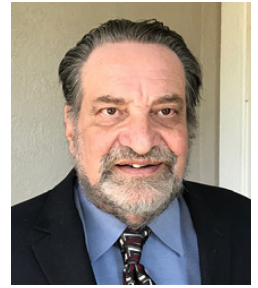
Biography

Dr Arlie Loughnan is Professor of Criminal Law and Criminal Law Theory at the University of Sydney Law School. She is a graduate of the University of Sydney, New York University Law School and the London School of Economics. Arlie's research concerns criminal law history and theory and she has a particular interest in criminal responsibility, the interaction of expert medical knowledges and legal knowledge, and the historical development of the criminal law. Arlie is the author of *Self, Others and the State: Relations of Criminal Responsibility* (CUP, 2020) and *Manifest Madness: Mental Incapacity in Criminal Law* (OUP, 2012).

DR JOHN GOLDENRING

Pediatrician, United States of America

MD, MPH, JD, FAAP, FSAHM, Fellow of the American College of Legal Medicine



The Brain Life Theory: Towards a Consistent Biological Definition of Humanness

In 1978 I first proposed that if we determine when human life ends by brain function, we should use the same standard in determining when life begins. My subsequent research suggest that fetal brain function begins between 8 – 10 weeks of gestation. This satisfies no one in abortion debates because abortion is about rights in conflict and not about when human life begins.

Biography

Dr John M Goldenring is a Board Certified Pediatrician with an academic sub-specialty in Adolescent Medicine. He has also held Board Certification in General Preventive Medicine. He holds a medical degree from Georgetown University, a Master's Degree in Public Health from the University of California, Berkeley, and a law degree from Concord-Kaplan Law School. His career includes academic and private practice and over 25 years as a Medical Director for Health Plans, Medical Groups and online health care programs. He is a Fellow of the American Academy of Pediatrics, the Society for Adolescent Health and Medicine and the American College of Legal Medicine.

PROFESSOR IAN FRECKELTON AO QC

Queen's Counsel, Victorian Practising Counsel, ACLM Honorary Fellow



Stillbirths in the Coronial Jurisdiction

In spite of its relative frequency, stillbirth is a phenomenon that has been relatively little discussed and requires further research for comprehensive clinical understanding. It impacts upon the legal system by way of the need to determine whether a life has come into being such that legal consequences can attach to it. This requires contemporary clinically informed interpretation and application of the ancient "born alive rule" in respect of the ramifications of matters such as pulseless electrical activity in the heart, brain activity and agonal gasping. In the coronial domain, discussion is currently taking place about whether coroners (as well as other public health officials) should be permitted to investigate and make findings and recommendations about cases of stillbirth.

Biography

Professor Ian Freckelton is a Queen's Counsel in full time practice as a barrister throughout Australia; a judge of the Supreme Court in Nauru; a tribunal member; a board and committee member; an investigator of allegations of misconduct; a professor of law, psychiatry and forensic medicine; a fellow of learned academies; a journal editor; a speaker at international gatherings; an author, editor and book reviewer; and a scholarly traveller. He is currently appearing in the Nelson Inquest in Victoria and the Kumanjaji Walker Inquest in Alice Springs. Ian is also a Professor of Law and a Professorial Fellow in Psychiatry at the University of Melbourne, an Adjunct Professor of Forensic Medicine at Monash University and an Adjunct Professor at Johns Hopkins University in the United States. He is the Editor of the Journal of Law and Medicine and the Founding Editor of Psychiatry, Psychology and Law. He is an elected Fellow of the Australian Academy of Law, the Australian Academy of Social Sciences and the Australasian College of Legal Medicine (Honorary). He recently completed 25 years' service as a member of the Mental Health Tribunal of Victoria, and has been a member of the Coronial Council of Victoria since its inception in 2010. He is the author of over 700 articles and some 50 books, including the 6th edition of Expert Evidence: Law, Practice and Procedure (Thomson, 2019, 7th edn, 2023) and COVID-19: Law Regulation and Human Rights (w Bennett and Wolf, OUP, 2022, in press). In 2021 he was made an Officer of the Order of Australia (AO) for distinguished contributions to the law and the legal profession, across fields including medicine, health and technology.

DR CRISTINA PELKAS

*Medical Registrar at Flinders Medical Centre, Lawyer
LLB (Hons) 2009 MD, ACLM Associate member*



Wills, Estates and End of Life Wishes:

The erosion of the lawyer's role in preparing our patients for loss of capacity

The *Advance Care Directives Act 2013* (SA) created Advance Care Directives (ACD), replacing the previous Enduring Power of Guardianship and other instruments. The legislation enabled ACDs to be prepared by individuals, rather than by legal practitioners.

Although removing cost barriers, the lack of legal practitioner involvement is problematic. Three anonymised case studies observed over a 3 month period in a large tertiary public hospital will be discussed. ACDs which should have been a valid expression of end of life wishes were invalid due to technical reasons, requiring recourse to the tribunal. Legal practitioner involvement is still arguably the gold standard.

Biography

Dr Cristina Pelkas is a dual trained doctor and lawyer who lives in Adelaide, South Australia. She is currently working at Flinders Medical Centre as a medical registrar. She also holds an appointment as an adjunct associate lecturer at the Flinders University of South Australia. Previously, she worked as a solicitor to the Australian government. Her research area of interest is health law, in particular public health law, ethical duties, occupational safety law and medical negligence.

PROFESSOR ROY BERAN

*Neurologist & Professor, MBBS MD FRACP FRACGP Grad. Dip. Tertiary Ed. Grad. Dip. Further Ed. FAFPHM
FRCP FACBS B Leg. S MHL FFFLM (Hon), ACLM Council Member, ACLM Honorary Life Fellow and
ACLM Joint Head of Teaching Faculty*



Withdrawal of Treatment v Insistence on Futile Treatment: Legal considerations

(Co-presented with Professor John Devereux)

Abstract coming soon...

Biography

Roy is trained as a consultant neurologist and accredited sleep physician, in addition to working within legal, military and aviation medicine. He is a Conjoint Professor of Medicine in the South Western Clinical School at the University of New South Wales and Liverpool Hospital, Professor in the School of Medicine at Griffith University, Queensland, and Professor Chair, Medical Law, at Sechenov Moscow First State University, Moscow, Russia. He is a founding Fellow of the Australasian College of Legal Medicine, a Past President thereof, having stepped down in 2011, and only the second elected Honorary Fellow of the College. He currently sits on Council and is a joint Head of Teaching Faculty of ACLM. He is also an Honorary Fellow of the Faculty of Forensic & Legal Medicine of the Royal College of Physicians (London).

PROFESSOR JOHN DEVEREUX

*Professor of Law, University of Queensland
ACLM Honorary Fellow and ACLM Joint Head of Teaching Faculty*



Withdrawal of Treatment v Insistence on Futile Treatment: Legal considerations (Co-presented with Professor Roy Beran)

Abstract — see above.

Biography

John Devereux teaches and researches the law of torts at the UQ Law School. He has a special interest in medical law, most notably in the areas of competency to consent to medical treatment and in epilepsy and the law. A Rhodes Scholar, John has worked as a lawyer in a variety of contexts including as a Barrister, as a consultant to a multi-national law firm, a Law Reform Commissioner for Queensland, a legal member of the Social Security Appeals Tribunal and as a Defence Force Magistrate. John was formerly Lecturer in Law at Keble College, Oxford University and Assistant Dean of Magdalen College, Oxford University. He is a former Associate Vice Chancellor of A.C.U. John is an Honorary Fellow of the Australasian College of Legal Medicine and joint Head of Teaching Faculty.

MR SCOTT DAVISON

Barrister, Victorian Practising Counsel



The Doctrine of Double Effect and Potential Criminal Liability of Medical Practitioners in Australia

Recent parliamentary inquiries into end-of-life choices identify the need to provide legal certainty for health practitioners working in end-of-life care. A concern identified is the lack of clarity surrounding the operation, status and application of the doctrine of double effect. This presentation clarifies these concerns. Although the doctrine is judicially recognised in several overseas jurisdictions, in Australia the doctrine of precedent means that it does not form part of the common law. In most jurisdictions, the fault element for murder includes recklessness, and application of the doctrine does not avoid criminal liability being established against orthodox criminal law principles. Although the prosecution of a medical practitioner who incidentally causes death in the proper course of medical treatment is a rare event, it remains a live issue. Legislative protection of medical practitioners, as has occurred in Queensland, South Australia and Western Australia, is the means to achieve the certainty sought.

Biography

Scott served with the Australian Regular Army (ARA) for more than 21 years reaching the rank of Major in the Royal Australian Armoured Corps. In 2006, Scott completed a Postgraduate Certificate in Professional and Applied Ethics at Melbourne University. On leaving the ARA, in 2009 Scott graduated with Honours from Monash University and is the 2009 recipient of the Supreme Court Exhibition Prize. After practising as solicitor since 2010, Scott was called to the Bar in 2017 where his practice is predominantly in Criminal Law. In 2022, Scott completes his Master of Laws with the University of Melbourne.

DR BEVERLEY FERRES

Geriatrician, Bendigo Health, MBBS DGM M Hlth & Med Law, ACLM Fellow



Legal and Ethical Issues at the End of Life

This presentation will focus discussion of the intersection between law and ethics at the end of life, in particular in relation to Voluntary Assisted Dying and also Withdrawal of Treatment. A brief comparison of the laws in different jurisdictions in relation to VAD will be made, and a clinical scenario to illustrate the dilemmas faced by doctors when treating patients at the end of life.

Biography

Dr Ferres has worked as a geriatrician at Bendigo Health for 34 years, working both with inpatients, and also in the community with the Aged Care Assessment Service. She was a sessional member of the Victorian Civil and Administrative Tribunal from 1998 to 2013, conducting hearings for the Guardianship List. She has a keen interest in the assessment of capacity, and medical decision-making for the cognitively impaired patient, both from ethical and legal perspectives. In 2002 she was admitted to the degree of Master of Health and Medical Law in the University of Melbourne. As well as tutoring in Ethical Practice and Medical Law to medical students, she has been a member of the Human Research Ethics Committee at Bendigo Health since 1996.

MR MATTHEW BOISSEAU

*Senior Solicitor, Crown Solicitor's Office, South Australia
LLB (Hons 1, University Medal), ACLM Affiliate member*



Guardians and the Power to Detain

In 2019, the Supreme Court of South Australia decided *Public Advocate v CB* [2019] SASCF 58, confirming that a guardian appointed for a person lacking decision-making capacity under s29 of the Guardianship and Administration Act 1993 (SA) had no power to place the person in a memory support unit without special powers authorising the detention of the person. As a consequence of the decision, many inpatients must await Tribunal orders before they can be discharged to a nursing home. The decision and reasoning in *CB* will be outlined, with a discussion of its consequences and the need for legislative reform.

Biography

Matthew Boisseau is a barrister and solicitor employed by the South Australian State Government. He specialises in courtroom advocacy and appears at the trial and appellate level in both civil and criminal matters. He has a particular interest in medical negligence and expert evidence.