



Faculty of Law  
University of Sydney

# Critical Issues in Public Health Law

Unit Outline and  
Study Guide

**2005**

Lecturer: A/Prof Roger Magnusson

Please bring this reading guide to every class !

# Critical issues in public health law

LAWS6839-61

## Reading Guide

Semester 1, 2005

### **Lecturers' contact details:**

- A/Prof Roger Magnusson, Faculty of Law, University of Sydney
- Ph: 9351 0211; e-mail: [rogerm@law.usyd.edu.au](mailto:rogerm@law.usyd.edu.au)

### **What is this unit about?**

**How does law contribute to public health?** This unit explores the role of law as a tool for improving the public's health, responding to public health risks and implementing policies designed to preserve and promote public health. It provides a foundation for further study in public health law, by clarifying the sources of public health law, the strategies that law can adopt, and debates about the proper role of law in protecting public health. The balance of the unit will then explore law's role within a number of critical areas. Key topics include:

- Acute public health threats (with a focus on SARS, and bioterrorism)
- Sexual health and STIs, including HIV/AIDS
- Tobacco control; and
- Food safety.

The unit also aims to provide illustrations of the legal environment of public health policy-making.

Throughout the unit, students will be trained to identify legal issues, to apply the law to policy tasks and public health issues, and to critically evaluate the success of the strategies law adopts to protect and promote public health. Students will also explore the tension between the public interest in protecting health, and competing public and private interests.

This unit does not adopt a narrow, legislative focus, nor does it provide a detailed review of all topics typically found in Public Health Acts, or associated statutes. Instead, the topics chosen as modules in this unit (and in the companion unit, New Directions in Public Health Law and Policy) have been identified with reference to the following criteria:

- the leading causes of death (mortality);

- the leading causes of disability (morbidity);
- legal issues in public health law that are highly political or that are currently a high priority for government;
- emerging issues and challenges for public health;
- issues that illustrate the legal environment of public health practice and policy-making.

This unit will not slavishly teach “the law” of any one jurisdiction. Instead, it aims to give students an appreciation of the legal context of public health practice from a broad perspective. While the emphasis is on Australian (and New South Wales law), U.S. and other materials are also referred to in many places, and efforts have been made to situate legal materials within the broader social and epidemiological context.

**Students wishing to extend their knowledge of public health law may enrol in the companion unit, “New Directions in Public Health Law and Policy”. Both units have been designed together to form a core program in public health law.**

## **Aims and Objectives of the Unit**

This unit aims to encourage students to recognise the complex, multi-faceted role that law plays in protecting and promoting, and in failing to protect and promote, public health, including in areas beyond the traditional core focus of Health Departments.

At the end of this unit, students will be expected to have an appreciation of the sources of public health law, legal strategies for preserving and improving public health, as well as the legal environment of public health policy-making. Through the unit, students will be trained to identify legal issues and to explore the tension between public goals and private rights and interests. Students will be expected to apply the law to particular policy contexts and public health issues and to critically evaluate the law’s efficacy in protecting and promoting the public’s health.

More specifically, this unit aims to build legal knowledge and skills in three distinct ways.

At the end of this unit, students will be expected to have an appreciation of:

- the sources of public health law;
- models of regulation and legal strategies for preserving and improving public health in the key or critical areas covered in the unit; and
- the legal environment in which public health practice and policy-making takes place.

Each of these outcomes relate to knowledge about the content of public health law.

Secondly, building on this knowledge, students will also be expected to have developed skills in:

- identifying legal issues, applying legal principles and developing legal arguments, and in
- critically evaluating the success or otherwise of the strategies law adopts to protect and promote public health.

These outcomes relate to capacity for legal reasoning, and evaluation of existing laws.

Thirdly, extending this knowledge, students will also be expected to have gained an appreciation of the contested nature of public health law, and of how the public interest in promoting and protecting public health competes with other public interests, and private interests and rights.

These outcomes relate to normative reasoning and critical reflection on the values embedded in public health law.

## **Teaching Methods**

This unit of study outline is a companion to the course materials. Students are expected to read prior to class, in order to maximise the opportunities for discussion and critical reflection in class. The course will be taught in a combination of mini-lecture, and interactive formats.

**Students are reminded to bring the relevant volume of course materials to class each day.**

## **Class Attendance**

Students are expected to attend class regularly, and an attendance record will be taken. If you cannot attend a particular seminar, please excuse yourself in advance (if possible) by e-mailing the lecturer at: <rogerm@law.usyd.edu.au>.

**While it is accepted that emergencies may arise, please be courteous to fellow students and to the lecturer by flagging with the lecturer in advance if you need to leave class early.**

Students attending class will be asked to sign the attendance sheet each class. Students must attend at least 70% of scheduled classes to qualify to have assessment graded and to sit the final exam. The Law Faculty Handbook states “Candidates are required to attend at least 70% of the scheduled classes in each Unit of Study for which they are enrolled. Candidates whose attendance record falls below this level without reasonable excuse may be precluded by the Dean or Pro-Dean (Teaching Programs) from taking the final assessment in that unit of Study”.

## **Assessment Package**

Students are required to choose from the following assessment options in order to make up an assessment package of 100%.

- Compulsory class work (20%)
- Essay (40%) or assignment (40%). Students may choose to submit both.
- Take-home exam (40%). Compulsory, except where the candidate has completed both the essay and assignment.

### **Compulsory classwork**

- Students will be required to submit short answers to questions that test understanding of key themes and issues covered in the readings. The purpose of this assessment element is to encourage students to develop their knowledge of the content of public health law, and to maximise the benefits of class discussions and small group work by encouraging students to read the materials in advance of classes.

### **Essay option**

- Students may choose to complete a research essay of 3,500 words (maximum word limit) from a list of possible topics. Students may only submit one essay.

### **Assignment option**

- Students may choose to complete an assignment from a list of possible topics. Students may only submit one assignment. Students who choose both the essay and assignment will not need to sit the take-home exam.

### **Take-home exam**

- Students sitting the take-home exam will choose from questions that may take a variety of formats. Essays must be submitted in hard copy.

### **Class participation**

- There will be no formal class participation mark but I reserve the right to take class participation into account if a student is on a borderline between grades.

## **Plagiarism & Associated Forms of Academic Misconduct**

What is plagiarism?

Plagiarism is the use of another person's words or ideas without specific acknowledgment. That is, you try to pass off someone else's work as your own. The rules against plagiarism apply equally to the work of published authors, internet sources, and the work of other students. Plagiarism also includes the unacknowledged use of work of your own if such work has previously been submitted in another course and awarded a grade.

Plagiarism is an academic offence not only because a person who plagiarises may obtain an unfair advantage over a student who expresses their ideas in their own words, but because it also subverts learning. Plagiarism subverts learning because it undermines the generic research and communication skills that are developed through the process of doing one's own work. This includes the skills developed in tracking down appropriate source material, developing key arguments and ideas individually, and expressing them in one's own words.

### **Examples of making unacknowledged use of work include**

- verbatim copying from sources. That is, you copy somebody else's words "word for word" (or only changing a word here and there), without indicating the source in a footnote. Common examples of this kind of plagiarism include verbatim copying

- from cases, published articles and books, internet sources, reading guides and handouts, and the work of other students. If you are copying “word for word” from a source, you need to use quotation marks.
- verbatim copying from sources, indicating the source in footnotes, but without indicating that you are in fact copying word for word. If you are quoting somebody else’s words, it is not sufficient simply to include the source in your bibliography without using quotation marks and without indicating the specific page(s) you are quoting from.
  - Using another source as the structure of your paper, and letting that author “do all the work for you”, citing the same cases, citing the same cases and copying the footnotes of that author. This is a form of copying and indicates a failure to engage independently with the issues. An essay that is “derivative” in the sense that it is substantially constructed by “cutting and pasting” bits and pieces from a variety of sources may also amount to misconduct, since it indicates a failure to engage independently with the issues and to develop your own arguments.
  - Failing to acknowledge sources that assist you in the development of your own argument. You are encouraged to read other authors’ work, and to make appropriate use of their ideas and their words. But it is important to make it clear what is your own reasoning, and when you are drawing upon the ideas (and the words) of other authors.
  - Copying the work of another student, or collaborating so closely with them that your finished product cannot reasonably be regarded as your own work and as embodying your own independent research and effort.

In addition to published and internet sources, common examples of plagiarism and derivative uses of material include the essays of fellow students, essays submitted by other students at other universities or in different units, and essays submitted for assessment by the author in different units of study.

You are also permitted and encouraged to discuss topics with your fellow students. In researching your essay, however, you should not co-operate so closely with a fellow student that you are jointly selecting quotes, planning essay structure or copying each other’s ideas.

It is not possible to submit jointly-researched papers, since it would not be possible to independently assess each student’s contribution to the final product.

The guiding principle, when it comes to plagiarism, is that you are being assessed for your own work, and while your own work may include the ideas, and quotations, of others, you need to make it clear what is yours, and what is theirs, so that your piece of work can be assessed fairly.

**The following examples of plagiarism have been inserted from the Law Faculty’s Teaching Handbook):**

[Patricia Williams, in her book *The Alchemy of Race and Rights*, Virago, London, 1993, says on p 102:

*“Affirmative action challenges many people who believe the truism that this is a free country. For people who don’t believe that there is such a thing as institutional racism, statements alleging oppression sound like personal attacks, declarations of war”*

If you read this and submitted work which reproduced, without sourcing to Williams, all or part of these sentences, it would be plagiarism. Changing word order, or substituting a few of your own words and still not sourcing the idea to the author is still plagiarism. So, for example, writing “*Affirmative action is challenging to many people who believe the cliché that this is a free country. People who don’t believe in institutional racism think that statements of oppression are declarations of war or personal attacks*” as if it is your own words, is plagiarism.

**Appropriate sourcing** means that you credit both words and ideas of other people’s which you have used when you use them. Where you have quoted directly, this should be indicated by quotation marks for short quotes, and indentation for long quotes. The footnote or reference mark should follow directly after this, and not, for example, at the end of a paragraph.

**Appropriate sourcing** also means that you use sources for what they actually said or did, and do not misrepresent them. A common mistake is to refer to a published author’s opinion as though this establishes a fact or conclusion. If a student wrote:

*“Affirmative action laws will never work because most people don’t believe that there is wide spread racism”<sup>1</sup>*

(1) Patricia Williams, *The Alchemy of Race and Rights*, Virago, London, 1993, at 102.

-it would be inappropriate sourcing. Williams is expressing an opinion in her piece, she is not establishing a fact, and her opinion is misused here as though it provided an evidentiary basis for a broad overstatement by the student. An appropriate use would be:

*“Williams argues that there is resistance to affirmative action in the community, based on a reluctance to acknowledge that there is institutional racism.<sup>1</sup> This may prove to be an impediment to affirmative action laws”*

(1) Patricia Williams, *The Alchemy of Race and Rights*, Virago, London, 1993, at 102.]

**Fictional sources.** Appropriate references can lend authority to a piece of written work, and enhance the argument it contains. Some forms of student assessment are research exercises where students are expected to go beyond the unit of study materials and to engage with the literature independently. Clearly, it is dishonest to make up sources to “bulk out” the argument.

For more specific advice on conventions for referencing, see “Instructions for written work” above.

**Other forms of academic dishonesty:** Plagiarism and misconduct as it relates to sources are not the only form of academic dishonesty that may arise with written work. Other examples include:

- Paying another person to write a student’s essay, or to conduct research for it;
- The fabrication of data that forms part of the written work;
- Copying, and other forms of cheating during, and in relation to, an exam (this includes communicating with other students during an exam, reading other students’ work during an exam, bringing forbidden material into an exam, and discussing the exam with someone who did not sit it simultaneously with the student and who is yet to sit it).

This is not an exhaustive list. Again, the principle that assists in identifying various forms of academic dishonesty is that the *process of training* that research essays and other forms of written work entail, require the student to do their own work. Similarly, in assessing student work in order to certify competence and achievement in a particular area, students must be assessed on their own work.

**Consequences of plagiarism & associated forms of misconduct:** If you engage in plagiarism, the consequences to you range from receiving a poor mark which reflects the lack of originality and poor referencing of the work, failing because you have not met the minimum standard required of written work in the Faculty of Law or, where it appears that you have been dishonest, referral of the matter to the Pro-Dean. The usual practice is for the Pro-Dean to convene a panel of three people who will discuss the issue with you. This may result in academic misconduct proceedings against you or disciplinary action by the Registrar. In all cases, the decision will be recorded in a file kept by the Pro-Dean.

Plagiarism is identifiable and is regularly encountered by lecturers, including myself. There have been instances of plagiarism in this unit in the past. Common “excuses” given by students include time and work pressure, personal stress and health problems. It is important to recognise these pressures and to plan your assessment commitments through semester to avoid placing yourself in an untenable position.

It is the student’s responsibility not to engage in plagiarism and associated forms of academic misconduct. If you are unsure about what amounts to academic misconduct, please speak to the lecturer.

**University practice on plagiarism and academic dishonesty is governed by Academic Board Resolutions, Academic Honesty in Coursework, 14 November 2002. This document is available on-line at several places (see below). Students are encouraged to read this policy.**

[http://fmweb01.ucc.usyd.edu.au/pol/FMPro?-db=pol\\_main.fp5&-lay=www&-format=pol\\_summary.html&-error=pol\\_error.html&DocID=9&-find](http://fmweb01.ucc.usyd.edu.au/pol/FMPro?-db=pol_main.fp5&-lay=www&-format=pol_summary.html&-error=pol_error.html&DocID=9&-find)

For further explanation of this policy, see <http://www.chs.usyd.edu.au/PG/honesty.html>

**Declaration.** Those submitting essays (and where appropriate, assignments or take-home exams) will be asked to sign a statement confirming that they understand what plagiarism is, and that their essay comprises their own original research. **An essay will not be marked unless it is accompanied by the signed form.**

**Please remember: essays and assignments will not be marked unless they are accompanied by the signed statement.**

## **Instructions for Written Work**

Essays should be typed, double-spaced, and should contain appropriate referencing and a bibliography. Keep a copy of your essay when you submit it.

Students should use the *Sydney Law Review* citation guide, which can be accessed from the *Sydney Law Review* homepage:

1. Click on <http://www.law.usyd.edu.au/~slr/slr.htm>
2. Click on “Writing for the Sydney Law Review”
3. Scroll down and click on “Sydney Law Review Style Guide”

Where material used in assignments has been obtained from the internet, appropriate references must be provided. Internet material should be cited by providing the address of the site accessed and the date on which it was accessed.

Students must retain an additional copy of their essays and assignments.

## **Submissions of Written Work, Extensions and Late Penalties**

All written work should be submitted on the due date unless an extension has been granted.

Do not exceed the word limit for a piece of assessment. (The word limit does not include footnotes, endnotes, or the bibliography).

Extensions of time will only be granted for illness or misadventure, supported by a doctor’s certificate. Extensions will not be given due to work commitments in other units or paid work commitments. Extensions will not be granted for late submission due to computer malfunction. Work that is submitted after the due date and without an extension will attract a penalty. **5% of the final mark awarded for the piece of work will be deducted for every week or part thereof that the work is late.**

## **Policy on Remarking and Appeals:**

Students who are disappointed with an assessment or exam result have the right to request an explanation of their grade. There is, however, no right to a remark, and you do not have the right to try to negotiate your mark with your lecturer or to lobby him or her to change a mark previously given in good faith.

If a student remains dissatisfied with their grade, they may appeal in writing to the Pro-Dean (Teaching Programs). The appeal will not be entertained unless the student can offer some reason to believe that the result was unfair or should otherwise be reopened, and unless the student has first approached the lecturer for an explanation of their grade. If the Pro-Dean agrees that the work should be re-marked, it will be independently remarked and the second mark (whether higher or lower) will be determinative.

## **Books & Prescribed Materials:**

**There are no prescribed texts. Two volumes of materials will be issued for this unit. The issued materials will provide the basis for classwork.**

However, I would recommend that students purchase:

- **Christopher Reynolds, Public Health Law and Regulation, Federation Press, 2004 [Australia focus]**

The following may also be helpful for references purposes:

- **Lawrence O. Gostin**, *Public Health Law: Power, Duty, Restraint*, University of California Press, 2000 [US focus]
- **Robyn Martin & Linda Johnson (eds)**, *Law and the Public Dimension of Health*, Cavendish, 2001 [UK focus].
- **David P. Fidler**, *International Law and Public Health: Materials on and Analysis of Global Health Jurisprudence*, Ardsley, New York: Transnational Publishers Inc., 2000 [International law focus]
- **Lawrence O. Gostin (ed)**, *Public Health Law and Ethics: A Reader*, University of California Press, 2002.
- **Richard A. Goodman et al**, (eds), *Law in Public Health Practice*, Oxford University Press, 2003 [U.S. focus].
- **Christopher Reynolds**, *Public Health Law in Australia*, Federation Press, 1995 [Australia focus]

## **Legal Resources in the Library, and Online:**

Material not extracted in the issued materials is available at University branch libraries; check the opening hours of the relevant library:

- Law library (Level 8, 173-175 Phillip St, Sydney)  
<http://www.library.usyd.edu.au/libraries/law/lawhours.html>
- Burkitt Ford Library (Level 2, Sir Edward Ford Building, A27)  
<http://www.library.usyd.edu.au/libraries/burkittford/>
- Medical (Level 3, Bosch Building D05, Western Avenue, Camperdown Campus)  
<http://www.library.usyd.edu.au/libraries/medical/>

Students are also expected to access statutory material listed in the Reading Guide. Some statutory material has been extracted in the course materials. Statutory materials that are listed in the reading guide but are not extracted in the course materials can be accessed via the internet.

### **How do I find legal resources on public health law?**

Most on-line health law resources are focused on (private) health care law, rather than public health law. The following links may, however, be helpful.

**On-line legislation (and case law)** can be found at the following sites:

- **Australian legislation** – AUSTLII: <http://www.austlii.edu.au>
- **United Kingdom legislation** – BAILII: <http://www.bailii.org/>
- **World Legal Information Institute** – WORLDII: <http://www.worldlii.org/>

- **US on-line legal information** at the Cornell Legal Information site:  
<http://www.law.cornell.edu/>
- **US federal legislation (the US Code)** available on-line at the Office of the Law Revision Counsel: <http://uscode.house.gov/download.htm>; see also <http://thomas.loc.gov/>

**Law journal articles** are held in hard copy the Law Library (see above). Alternatively, for electronic journals and on-line access, see:

- [http://www.library.usyd.edu.au/libraries/law/lig\\_journal.html](http://www.library.usyd.edu.au/libraries/law/lig_journal.html)
- **LegalTrac** (a searchable database of on-line law journal articles):  
<http://www.library.usyd.edu.au/databases/dbtitlel.html>

**Other on-line links & resources on public health law** include:

- Resources and links from the Centre for Public Health Law, School of Public Health, La Trobe University: [http://www.latrobe.edu.au/publichealth/centre\\_phl/links.htm](http://www.latrobe.edu.au/publichealth/centre_phl/links.htm)
- Resources and links from the Centre for Law and the Public's Health at Georgetown & Johns Hopkins Universities: <http://www.publichealthlaw.net/>
- Center for Disease Control, Atlanta, Georgia: <http://www.cdc.gov/>
- NSW Health: <http://www.health.nsw.gov.au/>
- Worldlii – Health & Medicine links: <http://www.worldlii.org/catalog/2411.html>
- Medical & Public Health Law site at Louisiana State University (<http://biotech.law.lsu.edu/index.htm>); includes bioterrorism resources (US focus): <http://biotech.law.lsu.edu/blaw/Bioterror.htm> and a good general topics list (US focus): <http://biotech.law.lsu.edu/cases/catagories.htm>
- Martindale “Virtual medical law” center: <http://www.martindalecenter.com/Legal.html> (extensive links)

On-line health law links at the University of Sydney library include:

- Links from the Law Faculty's Health Law Program: see <http://www.law.usyd.edu.au/program/index.htm>
- Links from the Law Library's pathfinder: [http://www.library.usyd.edu.au/libraries/law/pathfinder\\_health.html](http://www.library.usyd.edu.au/libraries/law/pathfinder_health.html)

Other Australian resources:

- Health law site at Monash University: <http://www.lib.monash.edu.au/subjects/law/medicallaw.html>
- Health law resources at the WebLaw site: <http://www.weblaw.edu.au/weblaw/index.phtml>

Other resources:

- PubMed: locating journal articles (sciences & medicine):  
<http://www.ncbi.nih.gov/> or <http://www.pubmed.gov>
- LocatorPlus: locating books, book chapters  
<http://locatorplus.gov/>

## **The Learning Assistance Centre and the Language Centre**

If you are having difficulties with your written expression, including essay writing style or structure, the Learning Assistance Centre runs several courses each semester which may be helpful for you. The LAC is located in the Education Building, Room 722, Level 7, Phone: 9351 3853, email: [lac@stuserv.usyd.edu.au](mailto:lac@stuserv.usyd.edu.au)

For students who would like additional help with English as a second language, the University of Sydney Language Centre has resources such as self study books, cassettes and videos, as well as audio/video language labs available for all students to use. The Language Centre is on Level 2, Christopher Brennan Building, Main Campus, Phone: 9351 2683, email: [langcent.enquiries@language.usyd.edu.au](mailto:langcent.enquiries@language.usyd.edu.au)

The following online resources may also be of assistance:

Grammar practice – resources for students:

<http://www.arts.usyd.edu.au/departs/english/grammar/default.html>

Writing resources on-line:

<http://www.library.usyd.edu.au/subjects/readyref/grammar.html>

## **Other Assistance**

The Faculty of Education and Social Work is offering a new postgraduate unit of study to help students with academic English. The unit has a focus on writing. This unit is open to all postgraduate students at the University of Sydney and is particularly relevant to students from non-English speaking backgrounds.

The unit is called “English in Academic Settings” (EDPJ 5024). The coordinator is Dr Lindy Woodrow. [l.woodrow@edfac.usyd.edu.au](mailto:l.woodrow@edfac.usyd.edu.au) Ph: 9351 6419.

## **Overview of this unit:**

Module 1: What is public health law and what should it be doing?

Module 2: Where does public health law come from?  
(Conceptualising the sources of public health law)

Module 3 : Acute public health threats (focus on SARS, and bioterrorism)

Module 4 : Diseases of consumption and lifestyle: focus on tobacco

Module 5 : Sexual health & public health: sexually transmissible infections (STIs) including HIV/AIDS

Module 6 : The legal environment of public health policy decisions: some examples (focus on occupational transmission of blood-borne viruses [BBVs], and on look-backs)

# Module 1:

## What is Public Health Law and What Should it be Doing?

### Aims of this unit

#### **In this unit you will be:**

- Encouraged to think critically about the proper boundaries of public health law, as a field of study;
  - Introduced to the role of legislation in public health, to the variety of topics that public health Acts regulate, and to reactive/specific vs proactive/generic forms of legislation;
  - Introduced to the history of public health law;
  - Given a brief overview of the major causes of death and disability in Australia and other industrialised countries such as the United States.
  - Introduced to the strategies and legal mechanisms through which public health law can respond to risks to public health, and seek to influence health outcomes.
- Legal concepts and structures: students who do not have a legal background are encouraged to read: **Christopher Reynolds, Public Health: Law and Regulation, Ch. 2** [not extracted in materials].

“The sum total of domestic public health legislation is a collection of *ad hoc* responses to particular threats to health as they are identified by science or public outrage, supported by a body of statutory instruments which are revoked as crises fade from public attention....The common feature of all the public health legislation is that it deals not with health, nor with the causes of consequences of ill health, but with individual identified nuisances....Public health legislation is negative in its approach, tackling issues detrimental to health and assuming health to be an absence of disease, rather than positive in working to create a healthy physical and social environment....There may be good political and economic reasons for persisting with a simplistic disease approach to public health. Containment of disease is relatively cheap and politically uncontroversial. It does not recognise poverty, inequality, class, race, gender and geography as determinants of health and so does not raise potentially expensive and fraught questions about distributive justice in the allocation of health resources. By relying on unsophisticated science and ignoring sociological causes of ill health, the law is able to propose simple and inexpensive measures in answer to complex health problems. The most common manifestations of serious ill health today are not cholera, smallpox or infection from drains and refuse, but cancer, heart disease and stroke, AIDS and drug abuse. little in existing

public health legislation addresses these conditions” (Robyn Martin, giving an assessment of U.K. public health legislation, in “Domestic Regulation of Public Health: England and Wales” in R. Martin & L. Johnson (eds), *Law and the Public Dimension of Health*, London: Cavendish Publishing, 2001, p 81, 82).

In the quote above, Martin is referring to public health legislation in the U.K. But could the same be said of Australian public health legislation, and New South Wales legislation, in particular?

[**Important note:** as the selected materials are drawn from a range of sources and authors, be aware of the *legal context* of each piece. Bracketed comments below, included in Module 1 only, may assist, but you need to be aware of this throughout the unit]

## 1. What’s in a public health Act? How did it get there?

- *Public Health Act* 1991 (NSW): available online at: [http://www.austlii.edu.au/au/legis/nsw/consol\\_act/pha1991126/](http://www.austlii.edu.au/au/legis/nsw/consol_act/pha1991126/)
- **(Sydney Law School Consultancy Team)**, “Historical Foundations of Public Health Legislation in New South Wales”, in *Reform of Public Health Law in New South Wales* (edited extracts from Consultancy Report, December 1998). [Australian authors writing about NSW law]
- **P. H. Curson**, *Times of Crisis: Epidemics in Sydney, 1788-1900*, Sydney: Sydney University Press, 1985 (selected passages). [historical piece]
- **Niyi Awofeso**, “What’s New About the ‘New Public Health?’” (2004) 94 *American Journal of Public Health* 705-709.
- **CDC**, “Ten Great Public Health Achievements – United States, 1900-1999” (1999) 48 *MMWR* 241-243. Consider the role of law in these achievements.
- *Public Health Act* 1997 (ACT) (selected provisions) [http://www.austlii.edu.au/au/legis/act/consol\\_act/pha1997126/](http://www.austlii.edu.au/au/legis/act/consol_act/pha1997126/)
- **Christopher Reynolds**, *Public Health Law & Regulation*, Sydney: Federation Press, 2004, pp 70-90, 94-99 [Australian author, Australian law].

### Trends in public health – Australia:

- **Diana M S Hetzel**, “Death, Disease and Diversity in Australia, 1951 to 2000” (2001) 174 *Medical Journal of Australia* 21-24
- **Basil S Hetzel & Stephen R Leeder**, “Half a Century of Healthcare in Australia” (2001) 174 *Medical Journal of Australia* 33-36
- **AIHW**, Media Release, 21 February 2002, “Smoke, Drink, Drugs = 228.400 in Hospital”.

## 2. What is the role of public health (as a field of professional activity)? What are its defining features? What does this mean for a theory of public health law?

“Our preferred definition [of public health] is ‘collective action for sustained population-wide health improvement’, which emphasises the hallmarks of public health practice: the focus on actions and interventions which require collective (or collaborative or organised) actions; sustainability, that is, the need to embed policies

within supportive systems; and the goals of public health: population-wide health improvement implying a concern to reduce health inequalities. A fundamental characteristic of public health action is that it acts primarily on the determinants of health that lie outside the control of individuals and are not responsive to market forces” (Robert Beaglehole & Ruth Bonita, *Public Health at the Crossroads: Achievements and Prospects*, Cambridge: Cambridge University Press, 2<sup>nd</sup> ed., 2004, p 174).

“Public health has many forms of expression. Public health applies knowledge derived from fields of inquiry that include epidemiology, sociology, anthropology, medicine, economics, and environmental science. Public health seeks to make healthy lifestyles, healthy policy, and a healthy economy, practical and applied ideals. Beside the natural environment and air and water quality, ozone levels and global warming, the topics of concern to public health also include the built environment – the world or work, housing, education and employment. Public health engages with the power play of politics, private enterprise, education, race, gender, and social status. It is prodigious in its avaricious appetite; it is frequently critical; it attends to things that should be done that are not being done; it is impudent in wanting to have so many fingers in so many pies; and it is intrusive and won’t stay still!” (Stephen Leeder, “Celebrating the Past; Awakening the Future...” (2003) 14 *NSW Public Health Bulletin* 41).

- **Lawrence Gostin**, *Public Health Law: Power, Duty, Restraint*, University of California Press, 2000 pp 3-22 [not extracted in materials] [U.S. author, writing for American audience]
- **Mark A. Rothstein**, “Rethinking the Meaning of Public Health” (2002) 30 *Journal of Law, Medicine & Ethics* 144-149 [U.S. author, writing for U.S. audience and beyond]

### **3. What can public health law do? How can public health laws achieve their aims? What can they require people to do?**

What are the tools that law can use to protect public health and to promote good health?

- **Lawrence Gostin**, “Law and Ethics in Population Health” (2004) 28 *Australian & New Zealand Journal of Public Health* 7-12 [U.S. author, writing for Australian & NZ audience]
- **Robyn Martin**, “Domestic Regulation of Public Health: England and Wales” in R. Martin & L. Johnson (eds), *Law and the Public Dimension of Health*, London: Cavendish Publishing, 2001, pp 83-100 [U.K. author, writing for U.K. audience]

#### **[Further reading]**

- Compare the PHA (NSW) with issues included within the Public Health Code (New York):  
<http://caselaw.lp.findlaw.com/nycodes/c91/a1.html>;  
<http://caselaw.lp.findlaw.com/nycodes/c91.html>
- **Australian Institute of Health & Welfare (AIHW), Australia’s Health 2004**,  
<http://www.aihw.gov.au/>
- **Lawrence Gostin**, “Public Health Law: A Renaissance” (2002) 30 *Journal of Law, Medicine & Ethics* 136-140.
- **Christopher Reynolds**, “The Promise of Public Health Law” (1994) 1 *Journal of Law and Medicine* 212-222.

- **Christopher Reynolds**, “Public Health Law: its Problems and Challenges” (1997) 20 *University of New South Wales Law Journal* 576-593.
- **Terry Carney**, “Best Practice ‘Visions’ of Public Health Law: Is Reform Needed?” (1999) 8(3) *Australian Health Law Bulletin* 29-33 & (1999) 8(4) *Australian Health Law Bulletin* 46-52.
- **Karen Wheelwright**, “Commonwealth and State Powers in Health – A Constitutional Diagnosis” (1995) 21 *Monash University Law Review* 53-83.
- **Jane Lewis**, “The Origins and Development of Public Health in the UK” in Holland, Detels & Knox (eds), *Oxford Textbook of Public Health*, 2<sup>nd</sup> ed., Vol 1: Influences of Public Health, Oxford: Oxford University Press, 1991, pp 23-34.
- International comparisons: **WHO**, *The World Health Report 2003*, Annex Table 2, Deaths by cause, sex and mortality stratum in WHO regions, estimates for 2002.  
<http://www.who.int/whr/2003/en/>
- **Robyn Martin**, “Domestic Regulation of Public Health: England and Wales” in R. Martin & L. Johnson (eds), *Law and the Public Dimension of Health*, London: Cavendish Publishing 2001, pp 75-83, 111-112 (provides a critical review of the current state of public health legislation in the UK, noting the uncoordinated growth of legislation that is similar to the Australian experience).

# Module 2:

## Where Does Public Health Law Come From?

### ▪ Conceptualising the sources of public health law

#### Aims of this unit

##### **In this unit you will be:**

- Introduced to the sources of public health law, with particular reference to international law.
- Introduced to some examples of public health laws that derive from each of the key sources.
- Encouraged to develop an appreciation of how legal architecture varies between countries, and how the legal framework facilitates and constrains a public health response to disease and ill-health.
- Presented with some detailed case studies of important public health issues raised by international law, constitutional law, statute law and common law, respectively.

### 1. International law and health governance

- **Yutaka Arai-Takahashi**, “The Role of International Health Law and the WHO in the Regulation of Public Health” in Robyn Martin & Linda Johnson (eds), *Law and the Public Dimension of Health*, Cavendish, London, 2001, pp 113-142.
- **World Health Organisation (WHO)**, *Constitution of the World Health Organisation* (edited extracts).
- *Framework Convention on Tobacco Control*; see, further: <http://www.fctc.org/>. This is a major achievement of the World Health Organisation (WHO), and an example of a treaty dealing with an important public health issue.
- **Robert Beaglehole & Ruth Bonita**, *Public Health at the Crossroads: Achievements and Prospects*, Cambridge: Cambridge University Press, 2<sup>nd</sup> ed., 2004, pp 254-256.
- **David P Fidler**, “A Globalized Theory of Public Health Law” (2002) 30 *Journal of Law, Medicine & Ethics* 150-161.
- **David P Fidler**, *International Law and Public Health: Materials on and Analysis of Global Health Jurisprudence*, Ardsley, New York: Transnational Publishers, 2000, pp 219-224 (discusses free trade, public health, and GATT)
- **WTO**, *Agreement on the Application of Sanitary and Phytosanitary Measures* (SPS agreement) (selected extracts): [http://www.wto.org/english/tratop\\_e/sps\\_e/sps\\_e.htm](http://www.wto.org/english/tratop_e/sps_e/sps_e.htm)

#### CASE STUDY ON INTERNATIONAL LAW:

- > **The World Trade Organisation (WTO) and public health: AIDS drugs for South Africa, TRIPS, parallel imports, DOHA, and all that.**

### Group 1a to focus on:

- **David P Fidler**, *International Law and Public Health: Materials on and Analysis of Global Health Jurisprudence*, Ardsley, New York: Transnational Publishers, 2000, pp 258-267 (extracts)
- Republic of South Africa, *Medicines and Related Substances Control Act* 1965 (as amended in 1997)
- **Russell Mokhiber & Robert Weissman**, “The Drug Lords Defeated”, <http://www.twinside.org.sg/title/lords-cn.htm> (accessed 24 December 2004)
- **James Love**, “Five Common Mistakes by Reporters Covering US/South Africa Disputes over Compulsory Licensing and Parallel Imports”, 23 September 1999.
- **News reports from the BMJ**: 4 December 1999; 319:1455. 20 May 2000; 320: 1357. 24 February 2001; 322: 447. 28 April 2001; 322: 1011.

### Group 1b to focus on:

- **David P Fidler**, *International Law and Public Health: Materials on and Analysis of Global Health Jurisprudence*, Ardsley, New York: Transnational Publishers, 2000, pp 258-267 (extracts)
- **Doha Declaration** (The Fourth WTO Ministerial Conference was held in Doha, Qatar from 9 to 14 November 2001. It gave rise to the “Doha Declaration”): [http://www.wto.org/english/thewto\\_e/minist\\_e/min01\\_e/mindecl\\_e.htm](http://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_e.htm)
- **Declaration on TRIPS and Public Health**: The Ministers also adopted a separate “Declaration on the TRIPS Agreement and Public Health” (20 November 2001). [http://www.wto.org/english/thewto\\_e/minist\\_e/min01\\_e/mindecl\\_trips\\_e.htm](http://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_trips_e.htm)
- **Decision on the Implementation of Para 6 of the Doha Declaration on TRIPS and Public Health** (selected extracts). On 30 August 2003, the General Council of the WTO adopted a process for parallel imports and compulsory licensing of pharmaceuticals by developing countries. [http://www.wto.org/english/tratop\\_e/trips\\_e/implem\\_para6\\_e.htm](http://www.wto.org/english/tratop_e/trips_e/implem_para6_e.htm).
- **Pollock & Price**, “New Deal from the World Trade Organisation” *BMJ* 13 September 2003; 327: 571-2.

## 2. Constitutional law

- **Lawrence Gostin**, *Public Health Law: Power, Duty, Restraint*, University of California Press, 2000, pp 25-59 [not extracted in the materials; I will speak to this].
- **Karen Wheelwright**, “Commonwealth and State Powers in Health – A Constitutional Diagnosis” (1995) 21 *Monash University Law Review* 53-83 [not extracted in the materials; I will speak to this].
- **Robyn Martin**, “Domestic Regulation of Public Health: England and Wales” in R. Martin & L. Johnson (eds), *Law and the Public Dimension of Health*, London: Cavendish Publishing, 2001, pp 102-104.

### CASE STUDY ON CONSTITUTIONAL LAW:

- > **Free Speech and Tobacco Speech: Lorillard Tobacco Co. v Reilly etc.**

### Group 2 to focus on:

- **Lawrence O. Gostin**, *Public Health Law: Power, Duty, Restraint*, Berkeley: University of California Press, 2000, pp 146-148, 155-165, 167-172.
- *Lorillard Tobacco Co. v Reilly* 121 S. Ct. 2404 (2001).

For reference:

- Australian Constitution: [http://www.austlii.edu.au/au/legis/cth/num\\_act/c167/](http://www.austlii.edu.au/au/legis/cth/num_act/c167/)
- United States Constitution: <http://www.law.cornell.edu/constitution/constitution.table.html>
- *Human Rights Act* 1998 (UK): [http://www.bailii.org/uk/legis/num\\_act/hra1998148/index.html#s1](http://www.bailii.org/uk/legis/num_act/hra1998148/index.html#s1)

### 3. Statute law/legislation

#### **CASE STUDY ON PUBLIC HEALTH LEGISLATION**

##### > Regulation of Food Safety in Australia

##### **Group 3 to focus on:**

Annotated extracts of the:

- *Food Standards Australia New Zealand Act* 1991 (Cth) [FSANZ Act] [http://www.austlii.edu.au/au/legis/cth/consol\\_act/fsanza1991336/](http://www.austlii.edu.au/au/legis/cth/consol_act/fsanza1991336/); and
- *Food Act* 2003 (NSW) [http://www.austlii.edu.au/au/legis/nsw/consol\\_act/fa200357/](http://www.austlii.edu.au/au/legis/nsw/consol_act/fa200357/)

### 4. Caselaw (the “common law”)

I've not heard it said better than by George Foreman (quoted in *The Australian*, 1 August 1991, p 14): - this is Foreman, talking about Evander Holyfield, another retired boxer who had pulled out of a contracted “feel-good” fight between the two. “I told Evander, ‘Son, it’s like I tell my children. When you do something wrong, you gotta pay’” Foreman said. “That’s what’s great about America. If you want justice, you don’t have to shoot a guy or karate chop him. You can take him to court. They have guys who go to college just so they can learn how to mess with you legally”.

How do courts determine whether a defendant owes a duty of care, under the tort of negligence? What is the relationship between duty of care and public health risk assessment?

- *Wyong Shire Council v Shirt* (1980) 146 CLR 40, at 47-48 per Mason J
- **Harold Luntz & David Hambly**, *Torts: Cases and Commentary*, 5<sup>th</sup> ed., LexisNexis Butterworths, 2002, pp 210-211.

#### **CASE STUDY ON COMMON LAW**

##### **Group 4a to focus on:**

- *E v Australian Red Cross Society* (1991) 31 FCR 399 (extracts). This case provides an illustration of the risk assessment calculus that courts apply when determining the existence and scope of the duty of care. In the case of a supplier of blood and blood products, the duty of care is owed to the class of persons who might potentially be recipients (including transfusion recipients). Whether or not a duty of care arises and

what is required to discharge it (a legal question) includes what is essentially a public health risk assessment process.

#### **Group 4b to focus on:**

- *Federal Court of Australia Act 1976* (Cth) s 33C, 33Z.
- *Graham Barclay Oysters Pty Ltd v Ryan* [2002] HCA 54 (extracts). State government agencies and local governments are able to exercise a variety of statutory powers to protect public health. These powers are exercisable in the public interest. This case illustrates an important issue that affects the real capacity of these powers to improve health outcomes. Remembering that private law– common law– obligations may constitute a powerful motivation for exercising statutory powers in the public interest, to what extent do statutory public health powers also give rise to a duty of care owed to individuals? To what extent will misfeasance by a governmental or statutory body (failure to exercise statutory powers) constitute a breach of private law duties owed to individuals?
- **Christopher Reynolds, Public Health: Law and Regulation**, pp 142-144. [Reynolds discusses the Wallis Lakes Oyster case and related cases in more detail pp 132-144].

#### **[Further reading]**

- **David P. Fidler**, *International Law and Public Health: Materials on and Analysis of Global Health Jurisprudence*, Ardsley, New York: Transnational Publishers Inc., 2000.
- **Allyn L. Taylor**, “Governing the Globalization of Public Health” (2004) 32 *Journal of Law, Medicine & Ethics* 500-508.
- **World Health Organisation**, International Health Regulations, see further at: <http://www.who.int/csr/ihr/en/>
- **World Trade Organisation (WTO)**, <http://www.wto.org/> (not to be confused with the look-alike, but considerably different <http://www.gatt.org/>).
- **WTO: TRIPS & Public Health Page on the WTO site:** [http://www.wto.org/english/tratop\\_e/trips\\_e/public\\_health\\_e.htm](http://www.wto.org/english/tratop_e/trips_e/public_health_e.htm)
- **WTO: Gateway to Uruguay round multilateral trade agreements: GATT, TRIPS, GATS etc:** [http://www.wto.org/english/docs\\_e/legal\\_e/legal\\_e.htm#services](http://www.wto.org/english/docs_e/legal_e/legal_e.htm#services)
- **Australia-US Free Trade Agreement:** <http://www.dfat.gov.au/trade/negotiations/us.html>
- [http://www.dfat.gov.au/trade/negotiations/us\\_fta/text/index.html](http://www.dfat.gov.au/trade/negotiations/us_fta/text/index.html)
- **Ronald Bayer, Lawrence O. Gostin, Gail H. Javitt et al**, “Tobacco Advertising in the United States: A Proposal for a Constitutionally Acceptable Form of Regulation” (2002) 287 *Journal of the American Medical Association* 2990-2995.
- **Alan B. Morrison**, “Counteracting Cigarette Advertising” (2002) 287 *Journal of the American Medical Association* 3001-3003.
- **Editorial**, “What Does the EI Do for its Citizens’ Health” (2005) 365 *Lancet* 189-190.

# Module 3:

## “Acute” Public Health Threats:

- SARS
- Bioterrorism

### Aims of this unit

#### **In this unit you will be:**

- Given an overview of Australia’s legal framework for responding to acute public health threats, using SARS, and bioterrorism as key examples.
- Encouraged to identify where and how law fits in within a framework for responding to highly infectious diseases, using Commonwealth and New South Wales laws as one model of law within a federal system, with American law as a comparison.
- Prompted to consider the relationship between Commonwealth powers and laws, and State powers and laws, in responding to highly infectious diseases.
- Encouraged to think deeply about the appropriate balance between effective public health interventions in an emergency and the protection of civil liberties.

### **1. SARS: social and medical context**

- **Ronald J. Glasser**, “We Are Not Immune”, *Harper’s Magazine*, July 2004, pp 35-42.
- What is SARS? **JAMA**, “Severe Acute Respiratory Syndrome (SARS)” (2003) 290 *JAMA* 3318.
- **Bill Bryson**, *A Short History of Nearly Everything*, Doubleday, London, 2003, pp 276-281.
- **N. Wade**, “Speed is Key Factor in Evolution of SARS Virus”, *Sydney Morning Herald* 31 January-1 February 2004, p 15.
- **James M. Hughes**, “The SARS Response – Building and Assessing an Evidence-Based Approach to Future Global Microbial Threats” (2003) 290 *JAMA* 3251-3.
- **WHO**, *The World Health Report 2003*, Chapter 5: “SARS: Lessons from a new disease” (extracts). Full document available on-line at: <http://www.who.int/en>
- **Paul Caulford**, “SARS: Aftermath of an Outbreak” (2003) 362 *The Lancet* s2-s3.
- **Peter A Cameron**, “The Plague Within: an Australian Doctor’s Experience of SARS in Hong Kong” (2003) 178 *Medical Journal of Australia* 512-513.
- **Ean Higgins**, “Armed for Bioterror”, *Weekend Australia*, 12-13 June 2004, p 29.

### **2. Responding to a “virtual epidemic”**

- Extracts from the Quarantine Act 1908 (Cth), the Quarantine Regulations 2000 (Cth), the Public Health Act 1991 (NSW) and the International Health Regulations (WHO). This legislation will be distributed as part of the “virtual epidemic” exercise.

### 3. Bioterrorism: operational issues

- **Richard Smallwood**, “Vaccines to Combat Bioterrorism”, paper given by the Commonwealth’s former Chief Medical Officer to the World Vaccine Congress, 27 November 2002.
- The Anthrax scare in the US in 2001: **Gay Alcorn**, “Anthrax Threat Spreads in Congress” *Sydney Morning Herald*, 19 October 2001 & **Raja Mishra & Anne Kirnblut**, “Letter that Spelled Death All the Way to Washington” *Sydney Morning Herald*, 29 October 2001

### 4. Legal and ethical issues raised by acute infectious disease outbreaks, bioterrorism and public health emergencies

#### Two perspectives:

“The necessity of maintaining the public’s trust...means that the argument that, in a public health emergency, there must be a trade-off between effective public health measures and civil rights is simply wrong. As the AIDS epidemic has demonstrated, the promotion of human rights can be essential for dealing effectively with an epidemic. Early in the course of the AIDS epidemic, public health officials recognized that mandatory screening for human immunodeficiency virus would simply help drive the epidemic underground, where it would spread faster and wider. Likewise, draconian quarantine measures would probably have the unintended effect of encouraging people to avoid public health officials and physicians rather than to seek them out. In this regard, the protection of civil liberties is a core ingredient in a successful response to a bioterrorist attack. Provisions that treat citizens as the enemy, with the use of the police for enforcement, are much more likely to cost lives than to save them” (**Annas**, see below).

“The precautionary principle – even when limited by the least restrictive/intrusive alternative, justice, and transparency – dictated that restrictive measures be imposed to halt the spread of SARS. It is not surprising that those primarily concerned with civil liberties would be troubled by the measures taken, that they would argue that in face of uncertainty greater deference be given to the rights of individuals. Nor is it surprising that those whose economic interests might have been harmed by travel advisories saw an “overblown” reaction that they feared would be ruinously costly. There is no way to avoid the dilemmas posed by acting without full scientific knowledge. Failure to move aggressively can have catastrophic consequences. Actions that prove to have been unnecessary will be viewed as draconian and based on hysteria” (**Gostin et al**, see below).

Who has the balance right, in your view?

- **Lawrence O. Gostin, Ronald Bayer, Amy L. Fairchild**, “Ethical and Legal Challenges Posed by Severe Acute Respiratory Syndrome” (2003) 290 *JAMA* 3229-3237.
- **George J. Annas**, “Bioterrorism, Public Health, and Civil Liberties” (2002) 346 *The New England Journal of Medicine* 1337-1342.
- **Ronald Bayer & James Colgrove**, “Public Health vs. Civil Liberties” (2002) 297 *Science* 1181.
- **Peter A. Singer et al**, “Ethics and SARS: Lessons from Toronto” (2003) 327 *British Medical Journal* 1342-1344.
- **Sanjaya N. Senanayake & Mark J. Ferson**, “Detention for Tuberculosis: Public Health and the Law” (2004) 180 *Medical Journal of Australia* 573-576.
- **Yutaka Arai-Takahashi**, “The Role of International Health Law and the WHO in the Regulation of Public Health” in Robyn Martin & Linda Johnson (eds), *Law and the Public Dimension of Health*, Cavendish, London, 2001, pp 113-142 [listed previously in Unit 1] (international aspects)

### [Further reading]

- **Lawrence O. Gostin et al**, “The Model State Emergency Health Powers Act: Planning for and Response to Bioterrorism and Naturally Occurring Infectious Diseases” (2002) 288 *Journal of the American Medical Association* 622-628.
- **George J. Annas**, “Bioethics and Bioterrorism” in Annas, *American Bioethics: Crossing Human Rights and Health Law Boundaries*, Oxford University Press, 2005.
- **William Martin**, “Legal and Public Policy Responses of States to Bioterrorism” (2004) 94 *American Journal of Public Health* 1093-1096.
- **Joseph Barbera, Anthony Macintyre, Larry Gostin et al.**, “Large-Scale Quarantine Following Biological Terrorism in the United States: Scientific Examination, Logistic and Legal Limits, and Possible Consequences” (2001) 286 *Journal of the American Medical Association* 2711-2717.
- **Jonathan D. Moreno**, *In the Wake of Terror: Medicine and Morality in a Time of Crisis*, A Bradford Book, MIT Press, Cambridge Massachusetts, 2003 [contains a number of interesting chapters, including on the U.S. Model State Emergency Health Powers Act].
- **James G Hodge JR**, “Bioterrorism Law and Policy: Critical Choices in Public Health” (2002) 30 *Journal of Law, Medicine & Ethics* 254-261.
- **Alexandra Minna Stern & Howard Markel**, “International Efforts to Control Infectious Diseases, 1851 to the Present” (2004) 292 *Journal of the American Medical Association* 1474-1479.
- **David M. Bell & the WHO Working Group...**, “Public Health Interventions and SARS Spread, 2003” (2004) 10 *Emerging Infectious Diseases* 1900-1906.
- **James E Fielding, Keftlemariam Yohannes, Hassan Vally et al.**, “Severe Acute Respiratory Syndrome Surveillance in Australia” (2004) 28 *Communicable Diseases Intelligence* 181-186, available on-line at: <http://www.health.gov.au/internet/wcms/publishing.nsf/Content/cda-pubs-cdipubs.htm>
- WHO, International Health Regulations: <http://www.who.int/csr/ihr/en/>
- WHO, *Global Crises – Global Solutions: Managing Public Health Emergencies of International Concern through the Revised International Health Regulations* (2002): <http://www.who.int/csr/resources/publications/ihr/en/whocdsgar20024.pdf>
- Forum on Microbial Threats, Board on Global Health, Institute of Medicine of the National Academies, *Learning from SARS: Preparing for the Next Disease Outbreak – Workshop Summary* (2004), available on-line at [http://print.nap.edu/pdf/0309091543/pdf\\_image/R1.pdf](http://print.nap.edu/pdf/0309091543/pdf_image/R1.pdf)
- **Lawrence O. Gostin**, “International Infectious Disease Law: Revision of the World Health Organization’s International Health Regulations” (2004) 291 *Journal of the American Medical Association* 2623-2627.

- **A Harris, R Martin**, “The Exercise of Public Health Powers in an Era of Human Rights: the Particular Problems of Tuberculosis” (2004) *Public Health* (in press).
- **G Samaan, M Patel, J Spencer et al**, “Border Screening for SARS in Australia: What Has Been Learnt?” (2004) 180 *Medical Journal of Australia* 220-223.
- **Peter A. Cameron, Timothy H. Rainer, Pieter De Villiers Smit**, “The SARS Epidemic: Lessons for Australia” (2003) 178 *Medical Journal of Australia* 478-479.

[Volume 2]

## Module 4:

# Diseases of Consumption & Lifestyle: Focus on Tobacco

### Aims of this unit

#### **In this unit you will be:**

- Given an overview of key themes and landmarks in tobacco litigation and legal regulation in the United States and Australia.
- Encouraged to identify strengths, weaknesses, achievements, failures, gaps and opportunities for action in tobacco control laws, in the light of changing social conditions and marketing practices.
- Given the opportunity to analyse, discuss and debate specific legal strategies for tobacco control.
- **Please note:** This unit aims to introduce you to some of the “fundamentals” of tobacco law. The unit *New Directions in Public Health Law & Policy* also contains a module on tobacco law. This module aims to review the variety of legal strategies that might be used to further discourage tobacco use. Students will be encouraged to think about the kind of laws that would separate a country (such as Australia) where 20% of the population smokes, from one where, say, 10% of the populations smoke (and where, as a result, the population is both healthier and wealthier).

#### **Read these perspectives:**

“The point I’m making is...that some day, some day our kids and grandchildren are going to say...[h]ow did you let them get away with it? How did you let them get away with it?” (Stanley Rosenblatt, addressing a Florida jury in *Liggett Group v Engle*. The jury went on to award \$145 billion in punitive damages, although this was overturned on appeal).

“The situation in the U.S., I think, from a litigation [perspective] hasn’t been as good as this for a decade or more. It’s the best I’ve seen it. It’s a situation we’ve been arguing for a long-time: that litigation is the cost of doing business. It is and the costs are going down and the risks are coming down...it’s all moving in our direction” (Martin Broughton, Chairman, British American Tobacco, 20 July 2003).

“For those who have long viewed tobacco as the nation’s premier preventable health disaster, the demolition potential of private litigation is enthralling. But those who seek a coherent national health policy will be disappointed” (Arthur B. LaFrance, “Tobacco Litigation: Smoke, Mirrors and Public Policy” (2000) 26 *American Journal of Law & Medicine* 187-203, at 193).

“Smoking kills and is addictive” (Philip Morris International website, frequently asked questions, <http://www.philipmorrisinternational.com/>)

“Philip Morris makes and sells a dangerous product, and they make more than a billion dollars a year doing it” (William S. Ohlemeyer, Vice President and Associate General Counsel, Altria Group Inc, speech entitled “Litigation: An Inefficient Means of Changing Corporate Behavior”, 18 July 2003, from the Altria website).

“I must now admit that it is truly refreshing and satisfying to go into court and before Congress and declare openly and honestly that cigarettes truly are addictive and truly are harmful. It makes me feel good to be able to do that. Our actions broke the industry’s code of silence and helped get crucial information about cigarette smoking and disease out to the public... You may ask why Liggett continues to sell cigarettes if we acknowledge their harmful effects. The reality is that smoking by adults is legal in this county and should remain so.... But hear me loud and clear – I am not encouraging anyone to smoke. I myself have quit and I would tell anyone close to me not to start...” (Bennett S. LeBow, Chair & CEO of Vector Group Ltd (owner of the Liggett Tobacco Group), addressing graduates of Drexel University, Pennsylvania, in a talk entitled ‘The Importance of Independent Thought’, 13 June 1998, [http://www.liggettgroup.com//pages/press\\_releases/press\\_release\\_02.html](http://www.liggettgroup.com//pages/press_releases/press_release_02.html)).

“It’s beyond my comprehension why the Government can’t just ban tobacco. There must be other ways of getting revenue apart from killing thousands of people... Kids ask why, if tobacco is so dangerous, does the Government allow it to be sold? It’s the Government that puts warnings on cigarette packets saying that smoking kills. Are they genuinely worried about public health, or do they just want to protect their own backsides? You’re not allowed to drink on the street, but you can smoke there. What are kids supposed to think?” (Melbourne plaintiff Rolah McCabe, now deceased, quoted in Christopher Kremmer, “With Every Breath” *Sydney Morning Herald*, 8-9 June 2002, p 23).

“There are already a billion smokers, and by 2030 about another billion young adults will have started to smoke. If current smoking patterns persist, worldwide mortality from tobacco is likely to rise from about four million deaths a year currently to about ten million a year around 2030 (increasing by one hundred million per decade) and will rise somewhat further in later decades. This means that tobacco will cause about 150 million deaths in the first quarter of the century and 300 million in the second quarter” (Richard Peto & Alan D. Lopez, “Future Worldwide Health Effects of Current Smoking Patterns” in C. Everett Koop, Clarence E. Pearson & M. Roy Schwarz, *Critical Issues in Global Health*, San Francisco: Jossey-Bass, 2002, pp 154-161, at 158).

## 1. Medical, social and regulatory context

“Each day in America, approximately 1,150 individuals die prematurely because of tobacco use. On a personal level, this means that children are deprived of parents, spouses are deprived of partners, and immense human capital is lost to families, businesses, and society” (Michael C. Fiore et al., “Preventing 3 Million Premature Deaths and Helping 5 Million Smokers Quit: A National Action Plan for Tobacco Cessation” (2004) 94 *American Journal of Public Health* 205-211).

- **Richard Edwards**, “The Problem of Tobacco Smoking” (2004) 328 *British Medical Journal* 217-219.
- **Martin J. Jarvis**, “Why People Smoke” (2004) 328 *British Medical Journal* 277-279.
- **Adam Shand**, “Hired Guns: The Powerful Network that Services and Protects Tobacco”, *The Weekend Australian Financial Review*, 20-21 April, 2002, p 21, 23.

## 2. Tobacco litigation

The vast share of tobacco litigation occurs in the United States. Although there are significant legal differences between legal systems in different countries, anyone who wants to become informed about smoking litigation will benefit from having a broad overview of trends in US litigation.

The attention we give to tobacco litigation in this module also illustrates the use of litigation as a “tool” for public health regulation more generally. Litigation also serves to identify a variety of laws that directly or indirectly impact on tobacco.

### Background

- **Richard A Daynard, Clive Bates, Neil Francey**, “Tobacco Litigation Worldwide” (2000) 320 *British Medical Journal* 111-113; on-line at: <http://bmj.bmjournals.com/cgi/content/full/320/7227/111>
- **Altria** (parent company of Philip Morris) “Specific Types of Tobacco Litigation”, from the Altria website: [http://www.altria.com/media/03\\_00\\_MediaRecPressRel.asp](http://www.altria.com/media/03_00_MediaRecPressRel.asp)
- **Lawrence O. Gostin**, *Public Health Law: Power, Duty, Restraint*, University of California Press, 2000, pp 291-297 (reviewing tobacco litigation).
- Theories of liability for injuries caused by smoking: **Lawrence O. Gostin**, *Public Health Law: Power, Duty, Restraint*, University of California Press, 2000, pp 278-282.
- **Australian Competition & Consumer Commission (ACCC)**, *Response to Senate Motion 1031 (24 September 2001)* (date of publication: April 2002) pp 20-23.

### The U.S. Master Settlement Agreement

- Master Settlement Agreement (USA): on-line at the National Association of Attorneys General website: <http://www.naag.org/issues/issue-tobacco.php>
- **Richard A. Daynard, Wendy Parmet, Graham Kelder at al**, “Implications for Tobacco Control of the Multistate Tobacco Settlement” (2001) 91 *American Journal of Public Health* 1967-1971.

### Individual claims

- *Federal Cigarette Labeling and Advertising Act* (US Code Title 15 > Chapter 36 (extracts)). On-line at: <http://www4.law.cornell.edu/uscode/15/ch36.html>
- *Cipollone v Liggett Group Inc.* 505 U.S. 504 (1992) (extracts). On-line at: <http://www.law.umck.edu/faculty/projects/frials/conlaw/cipollone.html>
- **“Federal pre-emption”**: Explanation of federal “pre-emption” defence relied upon by the tobacco defendant in *Cipollone*: **New York University School of Law**, *Fundamentals of American Law*, Oxford University Press, 1996, pp 30-32. How does the same issue manifest within Australia’s federal system?

### Class actions

- Overturning the largest punitive damages award in history (\$145 billion): *Liggett Group Inc v Engle*, No 3D00-3400, \_\_So.2d\_\_ (Fla. App.21 May 2003); available on-line at: <http://news.findlaw.com/nytimes/docs/tobacco/lgtengle52103opn.pdf>
- Decertifying a class claiming return of the purchase price of Marlboro “Lights”: *Philip Morris USA Inc v Hines* No 4D02-941, Fourth District Court of Appeal, Florida, 31 December 2003, on-line at: <http://www.4dca.org/opfrm.html>

### **Competition law and consumer protection**

- Examples of consumer protection provisions in Australian legislation: *Trade Practices Act 1974* (Cth) (selected provisions extracted); on-line at: [http://www.austlii.edu.au/au/legis/cth/consol\\_act/tpa1974149/](http://www.austlii.edu.au/au/legis/cth/consol_act/tpa1974149/)
- **Australian Competition & Consumer Commission (ACCC)**, *Response to Senate Motion 1031 (24 September 2001)* (date of publication: April 2002) (extracts).
- “Lights” claims: **The Senate, Community Affairs Legislation Committee**, *Tobacco Advertising Prohibition*, September 2004 (extracts from the report).

### **Smoking litigation in Australia**

- **Camille Cameron**, “Hired Guns and Smoking Guns: *McCabe v British American Tobacco Australia Ltd* (2002) 25 *Melbourne University Law Review* 768 (extracts). This was a case-note on the trial judgment before Eames J.
- *Legal Profession Regulation 2002* (NSW) s 142A.
- *BAT Australia Services Ltd v Cowell* (representing the estate of *Rolab McCabe, deceased*) [2002] VSCA 197 (6 December 2002) (extracts). Full judgment of the Victorian Court of Appeal on-line at: <http://www.austlii.edu.au/au/cases/vic/VSCA/2002/197.html>
- Letter written by Mr Brian Wilson of Clayton Utz, lawyers, to British American Tobacco, 29 March 1990 (quoted in para 38 of Eames J judgment in *McCabe v BAT Australia Services Ltd* [2002] VSC 73 (22 March 2002). The extract also includes paras 39-40 of the judgment of Eames J. How would you characterise the intention behind Wilson’s letter?
- **Simon Chapman**, “Smoke Screen”, *Good Weekend* (*Sydney Morning Herald Magazine*) 6 July 2002, pp 35-36.
- **William Birnbauer**, “Dirty Play by Tobacco Giant, Says Insider”, *Sydney Morning Herald*, 19-20 July 2003, p 1.

### **“Passive smoking”**

- See **Chris Reynolds**, *Public Health Law & Regulation* (Sydney: Federation Press, 2004), pp 281-283 for a brief overview [not extracted in materials]
- *Australian Federation of Consumer Organisations v Tobacco Institute of Australia Ltd* (1991) 98 ALR 670 (Morling J). In this case, the Federal Court found that an advertisement which denied that passive smoking causes disease was “misleading and deceptive conduct”, in breach of s 52 of the *Trade Practices Act 1974* (Cth).
- **Simon Chapman**, “Australian Bar Worker Wins Payout in Passive Smoking Case” (2001) 322 *British Medical Journal* 1139.
- **Bernard W. Stewart & Peter CB Semmler**, “*Sharp v Port Kembla RSL Club: Establishing Causation of Laryngeal Cancer by Environmental Tobacco Smoke*” (2002) 176 *Medical Journal of Australia* 113-116. Comments on a jury verdict awarding \$466,000 damages to a bar worker who sued her employer in negligence claiming that her throat cancer was caused by exposure to environmental tobacco smoke. Other cases have been based on occupiers’ liability, and workers compensation legislation.

- *Francey v Hilton Hotels of Australia Pty Ltd* [1997] HREOCA 56. Asthma-prone lung transplant makes successful complaint for disability discrimination on basis that failure to properly ventilate or provide non-smoking environment discriminated against her.
- **Lyn Danninger**, “Pub Smoke Ban Gets Thumbs Up”, *Illawarra Mercury* 14 October 2004.
- *Smoke-free Environment Act* 2000 (NSW) selected provisions.

### 3. Tobacco legislation

How should society respond, legally, to smoking?

- **Konrad Jamrozik**, “Population Strategies to Prevent Smoking” (2004) 328 *British Medical Journal* 759-762.

#### International trade in tobacco

“Free trade agreements include tobacco and often lead to tariff reductions that stimulate an increase in price and product competition, and thus in consumption... The removal of trade barriers tends to introduce greater competition that results in lower prices, greater advertising and promotion, and other activities that stimulate demand. One study concluded that in four Asian economies that opened their markets in response to U.S. trade pressure during the 1980s – Japan, South Korea, Taiwan, and Thailand – consumption of cigarettes per person was almost 10 percent higher in 1991 than it would have been if these markets had remained closed”. (World Bank, *Curbing the Epidemic: Governments and the Economics of Tobacco Control*, Washington D.C.: World Bank Group, 1999, p 14)

- General Agreement on Tariffs and Trade (GATT): key articles.
- Thailand – Restrictions on Importation of and Internal Taxes on Cigarettes, adopted Nov. 7, 1990, GATT Doc. DS10/R, BISD 37S/200 (extracted from **Fidler**, *International Law and Public Health: Materials on and Analysis of Global Health Jurisprudence*, Ardsley, New York: Transnational Publishers, 2000, pp 224-228).
- U.S. Surgeon General Report, *Reducing Tobacco Use* (2000). The report contains a number of “Fact Sheets”, including “US Tobacco Exports Fact Sheet”, hosted at the CDC website at: [http://www.cdc.gov/tobacco/sgr/sgr\\_2000/](http://www.cdc.gov/tobacco/sgr/sgr_2000/)
- 15 USC 1340 (exemption of cigarettes for export from labelling and packaging requirements)
- *Executive Order No. 13193, Jan 18, 2001, 66 F.R. 7387* issued by President Clinton, on US foreign tobacco policy.
- Australia-United States Free Trade Agreement, *Exchange of Letters Regarding Gambling, Alcohol, Firearms and Tobacco* (1 March 2004) [http://www.dfat.gov.au/trade/negotiations/us\\_fta/text/gambling\\_alcohol.pdf](http://www.dfat.gov.au/trade/negotiations/us_fta/text/gambling_alcohol.pdf)

#### Sale and promotion of cigarettes

- 42 US Code 300x-26 (State law regarding sale of tobacco products to individuals under the age of 18).
- *Commonwealth Constitution* s 96 (Financial Assistance to the States).
- *Public Health Act* 1991 (NSW) and *Public Health (Tobacco) Regulation* 1999 (extracts).
- *Tobacco Advertising Prohibition Act* 1992 (Cth) (extracts).

- **V Lawson**, “Glamour Puff” (2003) 12 *Tobacco Control* 3-5.
- **Stacey Carter**, “Worshipping at the Alpine Altar: Promoting Tobacco in a World Without Advertising” (2001) 10 *Tobacco Control* 391-393.
- **Valerie Lawson**, “Cigarette Marker to Cough Up Over Advert”, *Sydney Morning Herald*, 29 October 2002.
- **ASH Media Release**, “Philip Morris Guilty – Fined Over Tobacco Promotions Aimed at Young Women”, 8 November 2002. (ASH = Action on Smoking & Health).
- **Holly Byrnes**, “Fashion’s Smoking Gun: Top Designer’s Functions Sponsored by Cigarette Company” *The Sun-Herald* 11 August 2002, p 3.

#### Smoking bans//civil rights issues

- Relevant legislation: *Smoke-Free Environment Act* 2000 (NSW) [previously extracted].
- **Nick O’Malley**, “Pubs Rocked by Total Ban on Smokers”, *Sydney Morning Herald*, 13 October 2004
- **Nick O’Malley**, “Now Smokers Face Bans in Front of Pubs”, *Sydney Morning Herald*, 14 October 2004
- “New York Bars Go Smoke Free”, *Daily Mail*, 30 March 2003.
- “Minutes from Waverley Council Meeting held on 21 September 2004” (item relating to Smoking Ban on Bondi, Tamarama and Bronte beaches).
- **James P. Sweeney**, “Smoking with Kids in Car May Soon be Illegal”, *San Diego Union-Tribune*, 3 May 2004
- **Shirleen Holt**, “Risks of Cigarette Smoking Could Include Losing Your Job” (from the *Seattle Times*, posted to *MyrtleBeachOnline.com* 31 October 2004).
- Note *Anti-Discrimination Act* 1997 (NSW) and *Disability Discrimination Act* 1992 (Cth).

## 4. Recent developments

### In the United States: The Family Smoking Prevention and Tobacco Control Act: a failed attempt to re-invest the FDA with power to regulate tobacco:

- **Scott Gottlieb**, “Supreme Court Rules that FDA Cannot Regulate Tobacco Industry” (2000) 320 *British Medical Journal* 894 (noting the U.S. Supreme Court decision in *Brown & Williamson Tobacco Co v FDA* 529 U.S. 120 (2000)).
- **M. Siegel**, “Food and Drug Administration Regulation of Tobacco: Snatching Defeat from the Jaws of Victory” (2004) 13 *Tobacco Control* 439-440
- **M. L. Myers**, “Opposition in Search of a Rationale: the Case for Food and Drug Administration Regulation” (2004) 13 *Tobacco Control* 441- 443.

### In Australia: Report of the Community Affairs Legislation Committee

- **The Senate, Community Affairs Legislation Committee**, *Tobacco Advertising Prohibition*, September 2004 (extracts from the report).
- **Mike Seccombe**, “Howard Still Dependent on Tobacco Donations”, *Sydney Morning Herald*, 1 June 2004.

### [Further reading]

- WHO, Framework Convention on Tobacco Control  
<http://www.who.int/tobacco/fctc/en/>  
 See also <http://www.who.int/gb/fctc/>

- **Legacy Tobacco Documents Library** at the University of California, San Francisco – links to a vast array of resources (including US legislation & litigation):  
<http://legacy.library.ucsf.edu/index.html>
- **Eric A. Feldman & Ronald Bayer (eds)**, *Unfiltered: Conflicts Over Tobacco Policy and Public Health*, Cambridge, Massachusetts: Harvard University Press, 2004 (contains country-by-country review of tobacco policy & policy, including **John Ballard**, “The Politics of Tobacco Control in Australia: International Template?” (pp 89-113); **Ronald Bayer & James Colgrove**, “Children and Bystanders First: The Ethics and Politics of Tobacco Control in the United States” (pp 18-37); **Virginia Berridge**, “Militants, Manufacturers, and Governments: Postwar Smoking Policy in the United Kingdom” (pp 114-137).
- **Richard A. Daynard, Mark A. Gottlieb, Robert L. Kline et al.**, “Tobacco Prevention and Control”, in Goodman, Rothstein, Hoffman et al., (eds), *Law in Public Health Practice*, Oxford: Oxford University Press, 2003, pp 323-347.
- **Robert L. Rabin**, “The Third Wave of Tobacco Tort Litigation”, Stanford Law School, Public Law Working Paper No. 28, September 2001, Social Science Research Network Electronic Paper Collection, available on-line at:  
[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=283794](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=283794); also published in R.ober L. Rabin (ed), *Regulating Tobacco: Premises and Policy Options*, Oxford: Oxford University Press, 2001, pp 176-106.
- **Arthur B. LaFrance**, “Tobacco Litigation: Smoke, Mirrors and Public Policy” (2000) 26 *American Journal of Law & Medicine* 187-203.
- **Charles King III & Michael Siegel**, “The Master Settlement Agreement with the Tobacco Industry and Cigarette Advertising in Magazines” (2001) 345 *New England Journal of Medicine* 504-511.
- **David Kessler & Matthew L. Myers**, “Beyond the Tobacco Settlement” (2001) 345 *New England Journal of Medicine* 535-537.
- **F. A. Sloan, C. A. Mathews, J. G. Trogdon**, “Impacts of the Master Settlement Agreement on the Tobacco Industry” (2004) 13 *Tobacco Control* 356-361.
- **Ronald Bayer, Lawrence O. Gostin, Gail H. Javitt et al.**, “Tobacco Advertising in the United States: A Proposal for a Constitutionally Acceptable Form of Regulation” (2002) 287 *Journal of the American Medical Association* 2990-2995.
- **Michael Givel & Stanton A. Glantz**, “The ‘Global Settlement’ with the Tobacco Industry: 6 Years Later” (2004) 94 *American Journal of Public Health* 218-224.
- **“Dangerous tobacco”**: links to a vast array of tobacco-related cases and other resources:  
<http://medicolegal.tripod.com/dangeroustobacco.htm>
- *Tobacco Advertising and Promotion Act 2002* (UK), on-line at:  
[http://www.bailii.org/uk/legis/num\\_act/2002/20020036.html](http://www.bailii.org/uk/legis/num_act/2002/20020036.html)
- **Shook, Hardy & Bacon** (lawyers for Philip Morris USA), “The Trend Rejecting Certification of Tobacco Class actions”, January 2004, on-line at:  
[http://www.altria.com/download/pdf/Media\\_TrendsInClass\\_Action.pdf](http://www.altria.com/download/pdf/Media_TrendsInClass_Action.pdf)
- **The World Bank**, *Curbing the Epidemic: Governments and the Economics of Tobacco Control*, Washington: World Bank, 1999, on-line at:  
<http://www1.worldbank.org/tobacco/reports.asp>
- **Australia-US Free Trade Agreement**:  
<http://www.dfat.gov.au/trade/negotiations/us.html>
- *McCabe v British American Tobacco Australia Services Ltd* [2002] VSC 73 (22 March 2002) (judgment of Eames J): <http://www.austlii.edu.au/au/cases/vic/VSC/2002/73.html>
- **M Wakefield, T Letcher**, “My Pack is Cuter than Your Pack” (2002) 11 *Tobacco Control* 154-156.
- **Todd Harper**, “Marketing Life After Advertising Bans” (2001) 10 *Tobacco Control* 196-197.
- **Michael C. Fiore et al.**, “Preventing 3 Million Premature Deaths and Helping 5 Million Smokers Quit: A National Action Plan for Tobacco Cessation” (2004) 94 *American Journal of Public Health* 205-211

- **S.M. Carter**, “The Australian Cigarette Brand as Product, Person and Symbol” (2003) 12 *Tobacco Control* (Suppl III): iii79-iii86.
- **S.M. Carter**, “New Frontier, New Power : the Retail Environment in Australia’s Dark Market” (2003) 12 *Tobacco Control* (Suppl III): iii95 -iii101.
- **S.M. Carter**, “Going Below the Line: Creating Transportable Brands for Australia’s Dark Market” (2003) 12 *Tobacco Control* (Suppl III): iii87 -iii94.

# Module 5:

## Sexual Health & Public Health

### ▪ Sexually transmitted infections (STIs) including HIV/AIDS

#### Aims of this unit

##### **In this unit you will be:**

- Given an overview of the legal framework for regulating STIs in Australia.
- Introduced to the body of HIV/AIDS-specific legislation in Australia.
- Encouraged to identify the values and different “models” that underlie Australian legislation on STIs, and to debate competing models for regulation.
- Encouraged to consider the link between social practices (sexual practices) and effective law.
- Given an opportunity to explore the application of law in the delivery of STI-related health care services.

### 1. Social & epidemiological context

- **World Health Organisation (WHO)**, *The World Health Report 2003*, Chapter 3: “HIV/AIDS: Confronting a Killer” <http://www.who.int/whr/previous/en/> (for perusal).
- **Michael Scarce**, “A Ride on the Wild Side”, *POZ* magazine, February 1999.
- **Sabin Russell**, “Russian Roulette Sex Parties”, *San Francisco Chronicle* 29 January 1999.

The coal-face of HIV apathy, or, perhaps, the ultimate mutation of survivor guilt? These two articles discuss “bareback parties”, where participants consciously and deliberately engage in high-risk activities for a thrill (with even a theological dimension thrown in). Have protease inhibitors lead to a deadly apathy? These articles open an important theme in this module: law must begin by recognising the social context of the practices it hopes to influence.

- **Sophie Morris**, “Suicide by Instalment Plan” *The Australian* 19 March 2001, p 11.
- **Ruth Pollard**, “Call for National Health Strategy to Curb Rise in Sex Infections”, *Sydney Morning Herald*, 22 August 2002.

### 2. The legal framework

- See **Chris Reynolds**, *Public Health Law & Regulation* (Sydney: Federation Press, 2004), pp 218-226 for an overview of communicable diseases regulation in Australia

[not extracted in materials]. How does Australia keep track of outbreaks of sexually transmissible infections?

- **Roger Magnusson**, “Promoting Sexual Health: The Role of Law”, in in Meredith Temple-Smith and Sandy Gifford (eds), *Sexual Health: An Australian Perspective*, Melbourne: IP Communications (2005, forthcoming).
- **John Harrington**, “AIDS, Public Health and the Law: A Case of Structural Coupling?” (1999) 6 *European Journal of Health Law* 213-34.
- *Public Health Act* 1991 (NSW) (selected extracts)
- *Health Records and Information Privacy Act* 2002 (NSW) Schedule 1 (Health Privacy Principles: HPP 11: limits on disclosure of health information).
- *Privacy Act* 1988 (Cth) Schedule 3 (National Privacy Principles: NPP 2: use and disclosure of personal information, including health information)
- *Health Administration Act* 1982 (NSW) s 22.
- **NSW Health**, *Management of People with HIV Infection Who Risk Infecting Others*, Circular 2002/84 (19 September 2002).
- **John B Ziegler & Nicholas Graves**, “The Time to Recommend Antenatal HIV Screening for All Pregnant Women Has Arrived” (2004) 181 *Medical Journal of Australia* 124.
- **NSW Health**, *Contact Tracing Guidelines for the Sexually Transmissible Diseases and Blood Borne Viruses*, Circular 2000/84 (19 October 2000) (to follow up, see <http://www.health.nsw.gov.au/fcsd/rmc/cib/circulars/2000/cir2000-84.pdf>)

#### Criminal liability for disease transmission

- **Andrew Clennell**, “AIDS Attack Prison Officer Dies”, *Sydney Morning Herald*, 2 October 1997, p 3

#### The case of “F”:

- **Fiona Carruthers**, “Bisexual Faces Jail for Spreading HIV” *Weekend Australian* 7-8 March 1998, p 9.
- *Director of Public Prosecutions v F*, Remarks in Sentence, McInerney J, County Court of Victoria at Morwell, 6 March 1998.

#### The Dirckze case:

- **Benjamin Haslem**, “HIV Doctor Didn’t Tell Wife of Infection” *Weekend Australian* 25-26 July 1998, p 3.
- **Katherine Towers**, “GP Tested Positive, Then Courtied Wife” *Weekend Australian* 14-15 August 1999, p 8.

#### Debate following on:

- **Andrew McIntyre**, “The Unspoken Truth About HIV and ‘Unsafe’ Sex” *The Age* 20 August 1999, p 15.
- **Sandy Gifford**, “The Facts are Clear: the AIDS Risk is Real” *The Age* 24 August 1999, p 13.
- **Anne Mijch et al.**, “The Deadly Truths About HIV Infection” *The Age* 24 August 1999, p 12.

#### Civil liability for disease transmission

- **David Hirsch**, “Doctor’s Duty of Care to a Patient’s Sexual Partners” (1999) 8(5) *Australian Health Law Bulletin* 53-56.

- *PD v Harvey* [2003] NSWSC 487 (Cripps AJ). [This decision was upheld on appeal: see *Harvey & Ors v PD* [2004] NSWCA 97 (extracts from Santow JA, Ipp JA)].

### **STIs and developing countries: what role for law?**

- **Mark Heywood & Dennis Altman**, “Confronting AIDS: Human Rights, Law, and Social Transformation” (2000) 5 *Health and Human Rights* 149-179.
- **Daniel T. Halperin & Helen Epstein**, “Concurrent Sexual Partnerships Help to Explain Africa’s High HIV Prevalence: Implications for Prevention” (2004) 364 *The Lancet* 4-6.

### **[Further reading]**

- **Lawrence O. Gostin & James G. Hodge JR**, “Piercing the Veil of Secrecy in HIV/AIDS and Other Sexually Transmitted Diseases: Theories of Privacy and Disclosure in Partner Notification” (1998) 5 *Duke Journal of Gender Law & Policy* 9.
- **Andrew E. Grulich, Richard O. de Visser, Anthony M.A. Smith et al.**, “Sexually Transmissible Infection and Blood-Borne Virus History in a Representative Sample of Adults” (2003) 27 *Australian & New Zealand Journal of Public Health* 234-241.
- **Andrew E. Grulich, Richard O. de Visser, Anthony M.A. Smith et al.**, “Knowledge About Sexually Transmissible Infections and Blood-Borne Viruses in a Representative Sample of Adults” (2003) 27 *Australian & New Zealand Journal of Public Health* 230-233.
- **Catherine Campbell & Aodwa Mzaidume**, “Grassroots Participation, Peer Education, and HIV Prevention by Sex Workers in South Africa” (2001) 91 *American Journal of Public Health* 1978-1986.
- **Roger Magnusson**, “HIV Testing without Specific Consent: A Short Review” (1996) 20(1) *Australian and New Zealand Journal of Public Health* 57-60.
- **Roger Magnusson**, “A Decade of HIV Testing in Australia: Part 1: A Review of Current Legal Requirements” (1995) 18 *University of New South Wales Law Journal* 341-63.
- **Roger Magnusson**, “A Decade of HIV Testing in Australia: Part 2: A Review of Some Current Debates” (1995) 18 *University of New South Wales Law Journal* 364-408
- **Justice Michael Kirby**, “AIDS and the Law” *Commonwealth Law Bulletin*, January 1993, pp 350-366.
- **Justice Michael Kirby**, “Legal Implications of AIDS” (1990) 16 *Commonwealth Law Bulletin* 620-629.
- **Justice Michael Kirby**, “AIDS Legislation – Turning Up the Heat?” (1986) 60 *Australian Law Journal* 324-332.
- **Ronald Bayer & Kathleen Toomey**, “HIV Prevention and the Two Faces of Partner Notification” (1992) 82 *American Journal of Public Health* 1158-1164.
- **Geoffrey Walker**, “Australia’s Response to AIDS: the Law and the Policy Issues” in Stanislaw Frankowski (ed), *Legal Responses to AIDS in Comparative Perspective*, The Hague: Kluwer Law International, 1998, pp 169-219.
- **John A. Harrington**, “The Instrumental Uses of Autonomy: A Review of AIDS Law and Policy in Europe” (2002) 55 *Social Science & Medicine* 1425-1434.

# Module 6:

## The Legal Environment of Public Health Policy Decisions: Some Examples

- Occupationally transmitted infections
- Look-backs

### Aims of this unit

#### **In this unit you will be:**

- Introduced to the legal environment of policy-making on public health issues (taking occupationally-transmitted blood-borne viruses (BBVs) as an example).
- Encouraged to identify and discuss legal issues that constrain policy-making on occupationally transmitted BBVs, and to recognise that public health policy choices involve *private health law* issues.
- Encouraged to evaluate policies from a legal and ethical perspective.

Health care workers [HCWs] who perform “exposure-prone procedures” (EPPs) face a possible risk of acquiring a blood-borne infection from a patient. HIV, Hepatitis B (HBV) and Hepatitis C (HCV) have tended to be considered together in policies issued by Health Departments and professional bodies. “Invasive procedures” include any procedure that “pierces the skin or mucous membrane or enters a body cavity or organ”. Exposure prone procedures (EPPs) are characterised by the potential for “contact between the skin (usually finger or thumb) of the HCW and sharp surgical instruments, needles or sharp tissues (splinters/pieces of bone/tooth) in body cavities or in poorly visualised or confined body sites including the mouth. Procedures which lack these characteristics are unlikely to pose a risk of transmission of blood borne viruses from infected HCW>patient” (NSW Health, *Health Care Workers Infected with HIV, Hepatitis B and Hepatitis C*, Circular 99/88 (22 October 1999).

### **1. Personal, clinical and policy context of occupational transmission of BBVs**

- **Hacib Aoun**, “When a House Officer Gets AIDS” (1989) 321 *New England Journal of Medicine* 693-696.
- **Lawrence O. Gostin**, “A Proposed National Policy on Health Care Workers Living with HIV/AIDS and Other Blood-Borne Pathogens” (2000) 284 *Journal of the American Medical Association* 1965-1970.

- **NSW Health**, *Health Care Workers Infected with HIV, Hepatitis B and Hepatitis C*, Circular 99/88 (22 October 1999).
- **Mark Bek, Julian Gold, Michael Levy et al.**, “Investigation of Patients Potentially Exposed to an HIV-Infected Health Care Worker” (1994) 5(8) *NSW Public Health Bulletin* 83-84.

## 2. Policy and legal issues arising...

- **Roger Magnusson**, “Legal Parameters of a National Policy for the Management of Health Care Workers Infected with Blood-Borne Viruses (HIV, HBV, HCV)” [Unpublished discussion paper prepared for the Communicable Diseases Network Australia (CDNA) Consensus Conference, 31 October 2002]
- **Arthur S. Leonard**, “United States AIDS Law: Pragmatism & Politics” in Stanislaw Frankowski (ed), *Legal Responses to AIDS in Comparative Perspective*, The Hague: Kluwer Law International, 1998, pp 1-62, at 51-54.
- Duty of care: *Wyong Shire Council v Shirt* (1980) 146 CLR 40, 47-48 per Mason J.
- *Anti-Discrimination Act* 1977 (NSW) [selected extracts]
- *Health Records and Information Privacy Act* 2002 (NSW) [Health Privacy Principles, edited]
- *Public Health Act* 1991 (NSW) s 17 & *Public Health (General) Regulation* 2002 (NSW) s 10.
- Limits of the common law duty of confidence: *Sullivan v Sclanders* (2000) 77 SASR 419 at [34]-[43] summarises the “public interest” defence [not extracted in the materials]

### [Further reading]

- **Roger Magnusson**, “A Decade of HIV Testing in Australia: Part 2: A Review of Some Current Debates” (1995) 18 *University of New South Wales Law Journal* 364-408.
- **Centers for Disease Control and Prevention (CDC)**, “Updated U.S. Public Health Service Guidelines for the Management of Occupational Exposures to HBV, HCV, and HIV and Recommendations for Postexposure Prophylaxis”, *MMWR* 2001; 50 (No. RR-11).
- **Patti Miller Tereskerz, Richard D. Pearson & Janine Jagger**, “Infected Physicians and Physician Procedures: National Policy and Legal Reality” (1999) 77 *The Milbank Quarterly* 511-529.
- *H (A Healthcare Worker) v Associated Newspapers Ltd* [2003] Med.L.Rev. 124 (UK Court of Appeal decision on the publication of details relating to the identity of an HIV affected health care worker]; similarly, *X v Y* [1988] 2 All ER 648.

[end of unit]