

INTRODUCTION

This issue of *Canberra Law Review* appears during the COVID-19 Disruption of 2020, an inflection point for Australian higher education, much of business, government and law. The pandemic has seen restrictions on the freedom of movement and association that Australians take for granted. It has coincided with assertion by the People's Republic of China of restrictions on speech and association across the globe rather than merely in Hong Kong. Articles in this issue engage with principles and practice regarding law, especially Australian law's foundation in human rights as a basis of the liberal democratic state, and with questions regarding agency, technology and administration.

Bede Harris offers an insightful critique of the Australian Constitution in relation to dignity. Dr Harris comments that dignity is the foundational value of human rights documents and of the constitutions of several jurisdictions, in particular those of Germany and South Africa, where it is expressly recognised both as a substantive right and as an interpretative principle governing the entire constitution. In contrast to these values-based constitutions, the Commonwealth Constitution is 'value-less' in that it was drafted as a pragmatic response to competing claims of the colonies that would form the Australian federation, rather than under over-arching theory of the relationship between the individual and the state. That anti-theoreticism is reflected in the way in which the Constitution has been interpreted by the courts. Its failure to protect dignity imposes a moral duty on legal academics to encourage their students to think about the ways in which the Constitution should be reformed.

'Constructing Consent in the Australian Capital Territory' by Brendon Murphy considers the way in which consent has been constructed and evolved in the criminal law in the context of sexual assault. Dr Murphy's article compares and contrasts the test for consent across the Australian jurisdictions, with particular interest on consent in the ACT – the only jurisdiction in Australia with a negative consent model. The article examines the intersection of common law and legislation in that jurisdiction, and considers how consent came to be framed this way in that jurisdiction. It suggests that the ACT will likely adopt a two-part reform based on the law of New South Wales.

As a precursor of postmodernism Nietzsche quipped 'Let us beware of saying that death is the opposite of life. The living is only a species of the dead, and a very rare species'. In 'Thawing-out Personhood' Bruce Baer Arnold takes a different view, critiquing the belief system known as cryonics, summarized as 'freeze store reanimate' the legally dead. Dr Arnold's article discusses the culture and law of cryonics in relation to Australia, asking whether claims regarding reanimation are unconscionable and necessitate a specific statutory prohibition. The article further considers the implications for health, welfare and other law if cryonics was practical.

'The Right To Freedom of Religion and Belief in the Australian Education Sector' was written by a University of Canberra graduate student on a semester at the United Kingdom in 2019. The article by Brad Thomas offers a perspective on issues around Australia's contentious Religious Freedoms Bills. It explores questions about curriculum and delivery in Australian schools, discussing law's engagement or indifference to expression in classrooms within a multicultural state that has no established religion, lacks a constitutionally-enshrined justiciable Bill of Rights and adheres to international human rights agreements

Tess Watson's 'Delores Down The Rabbit-Hole' argues that popular culture offers a lense through which we can understand and examine how law functions in practice. The dystopian sci-fantasy *Westworld* is set in a world without the rule of law; rather it is governed by click-wrap contracts and a shadowy corporate culture where android hosts offer a sublime vacation in exchange for the complete commodification of the human "guests", mirroring the rise of surveillance capitalism in the real-world. The article examines how *Westworld* might work in practice, demonstrating that the concepts underpinning it are not so very far removed from our present-day common experience of law in Australia.

HUMAN DIGNITY AND THE AUSTRALIAN CONSTITUTION – A CRITIQUE

Bede Harris*

Today dignity is referred to as the foundational value of human rights documents and of the constitutions of several jurisdictions, in particular those of Germany and South Africa, where it is expressly recognised not only as a substantive right but also as an interpretative principle governing the entire constitution. In contrast to these values-based constitutions, the Commonwealth Constitution is 'value-less' in that it was drafted as a pragmatic response to competing claims of the colonies that would form the Australian federation, rather than in accordance with any over-arching theory of the relationship between the individual and the state. This anti-theoreticism continues to be reflected in the way in which the Constitution has been interpreted by the courts. Respect for human dignity is a universal entitlement, and the failure of the Constitution to provide protection for it imposes a moral duty on legal academics to encourage their students to think about the ways in which the Constitution should be reformed.

I INTRODUCTION

This article examines the concept of human dignity as a fundamental legal value and then discusses the extent to which the Constitution is consistent with that value.

Part II examines the concept of dignity in Ancient Rome, both in its broadest jurisprudential sense as a value underlying all law, and in the sense of a private right that could be vindicated by means of a civil action. This Part also discusses the way in which dignity jurisprudence was developed in the Roman-Dutch legal system of South Africa. Part III discusses how Renaissance and Enlightenment concepts of human dignity provided a foundation for natural rights, which in turn led to dignity becoming the value upon which international human rights documents were based. Part IV discusses 20th century jurisprudential writings on human dignity, with a focus on the McDougal-Lasswell school. Part V illustrates the role of dignity in the constitutional law of Germany and South Africa and the effect it has had on constitutional interpretation. Part VI argues that constitutional debate in Australia has been marked by a profound anti-theoreticism, reflected in the absence at the Constitutional Conventions of the 1890s of debate on the question of what values the Commonwealth Constitution should be founded on, a phenomenon which is still evident today. Part VII critiques the Commonwealth Constitution in light of human dignity, with a particular focus on protection of human rights. The article ends with Part VIII which calls for